8 IN THE CIRCUIT COURT OF SAID COUNTY

To the May Term, A. D. 1931.

State of Illinois,
County of Sangamon. } ss.

John Pokorna,
Plainiff,
vs.
The Wabash Railway Cmopany, a corporation,
Defendant. } Case.

DECLARATION.

John Pokorna, plaintiff, by Charles S. Andrus and W. St. J. Wines, his attorneys, complains of the Wabash Railway Company, a corporation, defendant, of a plea of trespass on the case.

First Count.

For that whereas the plaintiff, on, to-wit, the seventeenth day of August, A. D. 1929, at about the hour of 6 o'clock A. M. was driving a certain automobile truck west along and upon a certain public street in the City of Springfield, County and State aforesaid, known as Edwards street, towards and across another certain public street in said city known as Tenth street which intersected said Edwards street, and the plaintiff was then and there in the exercise of ordinary care and caution for his own safety; and the defendant was then and there possessed of, operating and using a certain locomotive engine with a certain train of cars attached thereto, south, along and upon said Tenth street; and the defendant then and there, by its servants, so carelessly and improperly drove said locomotive and train, that by and through the negligence and improper conduct of the defendant, by its said servants, in that behalf, the said locomotive engine and train then and there ran and struck with great force and violence upon and against the said automobile which the plaintiff was then and there driving as aforesaid, and thereby the plaintiff was then and there thrown with great force and violence

from and out of the said automobile to and upon the ground there, and was thereby then and there greatly bruised, hurt and wounded, divers bones of his body were then and there broken, his skull was fractured, his ear drums were ruptured, his eye sight was greatly impaired, and he became sick and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, hitherto said injuries so inflicted as aforesaid being permanent, during all which time he, the plaintiff, suffered great pain, and was hindered and prevented from attending to and transacting his affairs and business; and by means of the premises the plaintiff was forced to, and did then and there lay out divers sums of money, amounting to, to-wit, Two Thousand dollars, in and about endeavoring to be cured of his said wounds, hurts and bruises, occasioned as aforesaid; and also by the running and striking of the said train upon and against the said automobile as aforesaid, at the time and place in that behalf aforesaid, the said automobile, then of the value of One Thousand dollars, and whereof the plaintiff was then and there lawfully possessed, was crushed and destroyed, and then and there became and was rendered of no use or value to the plaintiff.

Wherefore, the plaintiff says that he is injured, and has sustained damage to the amount of Fifty Thousand dollars, and therefore he brings his suit, etc.

Second Count.

For that whereas the defendant, on, to-wit, the seventh day of August, A. D. 1929, was possessed of, operating and using a certain railroad extending through the county of Sangamon aforesaid, a portion of the tracks of said railroad running north and south on a certain street in the City of Springfield, county and state aforesaid, commonly known and called South Tenth Street; and the defendant then and there by its servants, drove a certain locomotive engine with a certain train of cars attached thereto, south, along and upon said South Tenth Street to and across another certain public street in said City of Springfield running east and west, and commonly known as East Edwards Street; and the plaintiff avers that at the point where said railroad crosses said intersection of Edwards Street there are four separate railroad tracks used and operated by the defendant; the plaintiff avers

that on the day and date aforesaid at about the hour of
13 six o'clock A. M. he was driving a certain automobile truck then and there owned by him, west; on the north side of said Edwards Street, approaching and intending to cross said railroad tracks on said South Tenth Street, and that he was then and there in the exercise of ordinary care and caution for his own safety; that there was then and there located on the northeast corner of said intersection a large building which was built flush with the sidewalk line on the said Edwards Street and flush with the east side of said South Tenth Street, which obscured the vision of any one approaching said railroad tracks from the east on said East Edwards Street; and plaintiff avers that on the day and date in question and prior to the said hour of six o'clock A. M. the defendant was using and occupying the east track of said railroad tracks as a storage track for the storage of freight cars; that said freight cars so stored on said east track occupied said track both north and south and adjacent to the intersection of said East Edwards Street, that the storage of said freight cars on said track north of said intersection obstructed the view of any one approaching said railroad tracks on said East Edwards Street from the east; that said intersection is located in a thickly populated section of the said City of Springfield, is approximately five blocks south of defendants passenger station, and only a short distance south of the thickly populated business section of said City of Springfield; that on the day and date in question the said crossing was a grade crossing, was not protected by gates, and was not protected by flagman, except between the hours each day of from, to-wit 7:30 A. M. to 5:30 P. M.; that in view of the premises persons traveling west on the said East Edwards Street toward and across said railroad tracks were peculiarly and extraordinarily exposed to danger, all of which facts were then and there well known to the defendant; the plaintiff avers that the defendant, by and through its said servants, had carelessly and negligently placed said freight cars on said east track in close proximity to the said intersection of said East Edwards street, and then and there carelessly and negligently operated its said train south toward and across said intersection, at a high and danger-
10 ous rate of speed, to-wit at a speed of twenty-five miles per hour, whereby and by reason whereof the said locomotive engine and train then and there ran and struck with great force and violence upon and against the said automo-

bile which the plaintiff was then and there driving as aforesaid, and thereby the plaintiff was then and there thrown with great force and violence from and out of the said automobile to and upon the ground there, and was thereby then and there greatly bruised, hurt and wounded, and divers bones of his body were then and there broken, and he became and was sick, sore, lame and disordered, and so remained for a long space of time, to wit, hitherto, during all which time he, the plaintiff, suffered great pain, and was hindered and prevented from attending to and transacting his affairs and business; and by means of the premises the plaintiff was forced to, and did then and there lay out divers sums of money, amounting to Two Thousand dollars, in and about endeavoring to be cured of his said wounds, hurts, bruises, occasioned as aforesaid; and also by the running and striking of the said train upon and against the said automobile as aforesaid, at the time and place in that behalf aforesaid, the said automobile then of the value of One Thousand dollars, and whereof the plaintiff was then and there lawfully possessed, was crushed and destroyed, and then and there became and was rendered of no use or value to the plaintiff.

Wherefore the plaintiff says that he is injured, and has sustained damage to the amount of Fifty Thousand dollars, and therefore he brings his suit, etc.

Third Count.

For that whereas the defendant, on, to-wit, the seventh day of August, A. D. 1929, was possessed of, using and operating a certain railroad extending through the county of Sangamon in the State of Illinois, and passing along and upon a certain public street in the City of Springfield, known as South Tenth Street, and was then and there possessed of, using and operating a certain locomotive engine and
11 passenger train which was then and there driving south and was under the care and management of divers servants of the defendant, approaching a certain east and west public street in the City, County and State aforesaid, known as Edwards Street, both of said public streets and the territory surrounding the intersection of the same, being closely built up and thickly populated section of said city, the said intersection being approximately five blocks south of defendant's passenger station in said city; and the plaintiff avers

that on said day and date and for a long period of time immediately prior thereto, the defendant had not maintained a flagman at said intersection between the hours of 5:30 o'clock P. M. and 7:30 o'clock A. M. following, nor any crossing gates, nor any signal device of any kind to warn persons about to cross said railroad tracks at said intersection, of approaching trains; the plaintiff avers that on the day and date aforesaid and for many years prior thereto, a certain brick building was located on the northeast corner of said intersection, which said building was built flush with the public sidewalk on the north side of said Edwards Street and flush with the street line of said South Tenth Street, thereby obstructing the view to the north of persons driving west on said Edwards Street and approaching said railroad tracks; and plaintiff avers that the defendant was then and there possessed of and using four railroad tracks crossing said intersection, and that at the time and place aforesaid the defendant was using the east track of said four tracks as a storage track for freight cars and had placed said freight cars along said east track approximately to within a few feet of the north line of said Edwards Street, which said freight cars obstructed the view of persons travelling west along said Edwards Street and approaching said railroad tracks from the east; and plaintiff avers that by reason of the premises the persons traveling west on the said East Edwards Street towards said railroad tracks were peculiarly and extraordinarily exposed to danger unless trains approaching said intersection from the north were traveling and operating with especial care and caution and at a low and moderate rate of speed, all of which facts were then and there well known to said defendant; and plaintiff avers that at about the hour of six o'clock A. M. on the day and date aforesaid, he was driving a certain automobile truck then and there owned by him, west, on the north side of said East Edwards Street and was approaching said railroad tracks, and that before crossing or attempting to cross said railroad tracks he stopped his automobile adjacent to said tracks, looked to the north and south and listened for the sound of an engine bell or whistle to ascertain whether any engine of the defendant was approaching said intersection, that he saw no train or engine approaching from either direction and that no bell or whistle on any approaching engine was rung or sounded by the defendant, whereupon he started his said automobile and attempted to cross said track; that just as he drove his

automobile on to one of said railroad tracks he saw an engine and train of cars approaching said intersection from the north at a high and dangerous rate of speed, to-wit, at a speed of twenty-five miles per hour but that it was then too late for him either to stop his car or clear the said track on which the train of the defendant was being operated; and plaintiff avers that in view of the premises heretofore stated, the defendant then and there, by its said servants, with intentional disregard of its duties in that behalf and with a disregard of the consequences to persons lawfully using the intersection of said East Edwards Street and said Tenth Street, and with a willingness to inflict injury upon any such user of said intersection drove the said engine on to and against the said automobile in which plaintiff was then and there riding and the plaintiff was thereby thrown with great force and violence from said automobile on to and upon the public street there, whereby both bones in both of his legs below the knee sustained a compound comminated fracture, he suffered a fracture at the base of his skull extending upwards toward both of his ears, he sustained a rupture of both ear drums, numerous wounds, cuts and lacerations about the body and other injuries, among them being serious and permanent injury to his eyes which has greatly diminished his ability to see; and plaintiff avers that as a result of the said injuries so received by him as aforesaid he has been permanently injured in the respects charged, his health has been
14 greatly impaired, and his earning capacity has been greatly and permanently reduced; and the plaintiff avers that the said truck in which he was then and there riding was then and there and thereby totally destroyed and demolished, the damage to said truck amounting to, to-wit, the sum of One Thousand Dollars; and the plaintiff avers that as a result of said injuries he was confined to a hospital for a long period of time and incurred a hospital bill for care and attention amounting to, to-wit, the sum of Six Hundred dollars and incurred a pyhsician's bill of, to-wit, Eight Hundred dollars and has incurred other expenses amounting to, to-wit, the sum of Two Hundred dollars for medicine, crutches, etc., in endeavoring to be healed and cured of his said injuries; and plaintiff avers that as a result of said injuries he has experienced and endured great pain and suffering, and will continue so to suffer in the future; and the plaintiff avers that the defendant and its said servants then and there controlling and managing said locomotive engine and train, were

conscious of their conduct in the respects charged to have been improper and that their conduct in question would naturally probably result in injury to persons crossing said railroad tracks at said intersection, wherefore plaintiff avers that the injuries then and there inflicted upon him, were then and there willfully and wantonly inflicted.

Wherefore the plaintiff says that he is injured and has sustained damage to the amount of Fifty Thousand Dollars and therefore he brings his suit, etc.

CHARLES S. ANDRUS
W. ST. J. WINES
Attorneys for Plaintiff

Filed Apr. 23, 1931 R. G. Moore, Clerk

Filed May 12, 1931 S. T. Burnett, Clerk

15 And afterwards to-wit on the 23rd day of April, A. D. 1931, there was issued out of the office of the Clerk of the Sangamon County Circuit Court, a certain Summons; a copy of said Summons, together with the endorsements of the Sheriff thereon, being in the words and figures as follows, to-wit:

State of Illinois, } ss.
Sangamon County. }

The People of the State of Illinois to the Sheriff of Sangamon County—Greeting:

We Command You To Summon The Wabash Railway Company, a corporation if to be found in your County, to appear before the Circuit Court of Sangamon County, on the first day of the next term thereof, to be holden at the Court House in the City of Springfield, on the first Monday in the Month of May, A. D. 1931, to answer unto John Pokora, in an action of Case, Damages $50,000.00, and hereof make due return to our said Court as the law directs.

Witness, R. G. Moore, Clerk of said Court, and the Judicial Seal thereof, at Springfield, this 23rd day of April, A. D. 1931

R. G. MOORE,
Clerk

(Official Seal)

On the reverse side: John Pokora vs. Wabash Railway Company, Summons, to May Term, A. D. 1931, Filed Apr. 28, 1931, R. G. Moore, Clerk. Charles S. Andrus, W. St. J. Wines, Plaintiff's attorney $1.40 by Andrus.

State of Illinois, } ss.
Sangamon County. }

I have served the within writ on the within named The Wabash Railway Company, a corporation, by reading the within R. W. McElroy, Chief Clerk of said Wabash Railway Company, a corporation, and at the same time delivering to the said R. W. McElroy a true copy of the within writ, this 23rd day of April, A. D. 1931, The President of The Wabash Railway Company, a corporation, not found in my county.

S. T. METCALF,
Sheriff

16 And afterwards to-wit on the 4th day of May, A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court, a certain Notice For Removal; a copy of said Notice, together with acknowledgment of service thereon being in the words and figures as follows to-wit: Notice of Removal

17 IN THE CIRCUIT COURT OF SAID COUNTY,

To the May Term, A. D. 1931.

State of Illinois, } ss.
County of Sangamon. }

John Pokora, *Plaintiff,*
vs.
The Wabash Railway Company, a corporation, *Defendant.* } Case.

To Charles S. Andrus, Esq., and W. St. John Wines, Esq., Attorneys for Plaintiff:—

Please Take Notice That the Defendant will on the 4th day of May, A. D. 1931, at 9:00 o'clock a. m., or as soon thereafter as counsel can be heard, move the Court for an Order

removing said cause to the District Court of the United States, for the Southern District of Illinois, Southern Division, in accordance with the petition and Bond of the Defendant, copies of which are hereto attached.

Dated this 30th day of April, A. D. 1931.

ALLEN AND CONVERSE
Attorneys for Defendant

Received a copy of the foregoing Notice, together with a copy of the Petition and Bond, referred to therein, this 30th day of April, 1931.

CHARLES S. ANDRUS
Attorneys for Plaintiff

Filed May 4, 1931 R. G. Moore, Clerk

18 And afterwards to-wit on the 4th day of May, A. D. 1931, there was filed in the office of the Clerk of the Sangamon County Circuit Court a certain Petition and Bond for Removal to the United States District Court Southern District Southern Division; a copy of said Petition and Bond for removal being in the words and figures as follows to-wit:

19 IN THE CIRCUIT COURT

May Term, A. D. 1931.

State of Illinois, } ss.
County of Sangamon. }

John Pokora, *Plaintiff,*
vs.
Wabash Railway Company, A corporation, *Defendant.*

Petition for the removal of the above-entitled cause to the United States District Court, For the Southern District of Illinois Southern Division:

To the Honorable, the Presiding Judge of the Circuit Court of Sangamon County, State of Illinois:

Your petitioner respectfully shows that it is defendant in the above entitled cause, and that the matter and amount in

dispute in the said suit exceeds, exclusive of interest and costs, the sum or value of $3,000.00.

Your petitioner further shows that said suit is of a civil nature, of which the District Courts of the United States have original jurisdiction, and is a controversy wholly between citizens of different states, to-wit: between the said plaintiff, who was at the time of the commencement of said suit, and still is, a citizen, inhabitant and resident of the State of Illinois and this petitioner, which was at the time of the commencement of said suit, and still is, a corporation created and organized by and under the laws of the State of Indiana, and a citizen and resident of said State of Indiana, and a non-resident of the State of Illinois.

That this cause was filed in this Court on the 23rd day of April, 1931, and that the time to plead, answer or demur to the same has not expired under the laws of this state, or the rules of this Court in such cases made and provided.

That said controversy is of the following nature, to-wit: a civil action for damages to person and property by reason of a collision between plaintiff and a locomotive of the defendant at a grade crossing in the City of Springfield, County of Sangamon and State of Illinois.

That the question is as to the liability of the petitioner for said damages to the person and property of plaintiff, and the plaintiff and your petitioner are actually interested in said controversy.

Your petitioner offers herewith a bond with good and sufficient surety, for its entering in said District Court of the United States, within the time as required by law, a copy of the record in this suit, and for paying all costs that may be awarded by said District Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto.

The Petitioner Therefore Prays This Honorable Court to proceed no further herein, except to make the order of removal required by law, and to accept the said surety and bond, and to cause the record herein to be removed into the said District Court of the United States, in and for the Southern District of Illinois; Southern Division.

WABASH RAILWAY COMPANY
Petitioner

By ALLEN AND CONVERSE
Attorneys for Petitioner.

State of Illinois, } ss.
County of Sangamon. }

HENRY A. CONVERSE, being duly sworn, states that he is one of the attorneys for the petitioner in the above entitled cause; that he is duly authorized to make this affidavit on its behalf; that he has read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true as he verily believes.

HENRY A. CONVERSE

Subscribed in my presence, and sworn to before me this 30th day of April, A. D. 1931, and I certify that I am authorized to administer oaths, and that my commission expires Sept. 4, 1934.

L. S.

L. M. IRVING,
Notary Public.

21 Removal Bond.

Know All Men By These Presents, That we, Wabash Railway Company, as Principal, and American Surety Company of New York, as Surety, are held and firmly bound unto John Pokora, in the penal sum of Five Hundred Dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors, representatives, heirs and assigns, jointly and severally, firmly by these presents.

Yet Upon These Conditions: The said Wabash Railway Company having petitioned the Circuit Court of Sangamon County, State of Illinois, for the removal of a certain cause therein pending, wherein John Pokora is plaintiff and the said Wabash Railway Company is defendant, to the District Court of the United States, in and for the Southern District of Illinois, Southern Division:

Now, if the said Wabash Railway Company, the petitioner, shall enter in the said District Court of the United States, within 30 days from filing of said petition for removal, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise to remain in full force and virtue.

Witness our hands and seals this 29th day of April, A. D. 1921.

WABASH RAILWAY COMPANY
By N. S. BROWN,
Vice-President.

Attest:
W. D. BENDER
Assistant Secretary

AMERICAN SURETY COMPANY OF NEW YORK
By W. C. KIKENDALL,
(Seal) *Res. Vice Pres.*

Attest:
R. W. TROXELL,
Res. Asst. Secy

State of }
County of } ss.

I, of said County and State, and surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the said County, and State of and a Property Holder Therein: That I am worth the sum of Dollars over and above all my debts and liabilities and exclusive of property by law exempt from execution, and that I have property in the said County of and State of liable to execution, of the value of more than One Thousand Dollars.

Subscribed and Sworn to before me this day of A. D. 192

Notary Public

My commission expires

State of Illinois }
County of Sangamon } ss.

I, Beulah E. Lindsay, a Notary Public of Sangamon County in the State of Illinois, do hereby certify that W. C. Kikendall, Resident Vice-President and R. W. Troxell, Resident Assistant Secretary of American Surety Company of New York, personally known to me to be the same per-

sons whose names are subscribed to the foregoing instrument and personally known to me to be the Resident Vice-President and Resident Assistant Secretary, respectively, of said American Surety Company of New York, appeared before me this day in person and acknowledged that they signed, sealed and delivered the said instrument as their free and voluntary act as such Resident Vice President and Resident Assistant Secretary respectively, and as the free and voluntary act of said American Surety Company of New York, for the uses and purposes therein set forth.

Given under my hand and notarial seal at my office in the City of Springfield, on this 29 day of April, A. D. 1931.

BEULAH E. LINSAY,
Notary Public

My license expires May 4, 1934.

23 Form G 362 7-30 (Incorporated April 14, 1884)

AMERICAN SURETY COMPANY OF NEW YORK
General Offices, 100 Broadway
FINANCIAL STATEMENT, JUNE 30, 1930

RESOURCES

Real Estate:			
Home Office Premises, unencumbered, less depreciation		$ 8,356,069.17	
Securities at Market Value:			
Bonds	$ 6,068,660.01		
*Stocks	10,621,923.33	16,690,583.34	
Premiums in Course of Collection		2,905,783.82	
Cash in Banks and Offices		2,233,802.88	
Reinsurance and other Accounts Receivable		229,320.34	
Accrued Interest and Rents Receivable		92,280.16	$30,510,839.72

*At market values with exception of stocks of subsidiary companies, which are carried at par or cost being in each instance less than book value.

LIABILITIES

Capital Stock		$ 7,500,000.00	
Surplus and Undivided Profits	$ 7,855,770.61		
Voluntary Special Reserve	1,250,000.00	9,105,770.61	
Reserve for Unearned Premiums		7,161,405.35	
Reserve for Contingent Claims		4,438,713.91	
Reserve for Outstanding Premiums		700,000.00	
Reserve for Expenses and Taxes		1,282,476.87	
Reinsurance and Other Accounts Payable		322,472.92	$30,510,839.72

TROXELL, KIKENDALL & CO.
General Insurance Agency
Springfield, Ill.

24 Filed May 4, 1931 R. G. Moore, Clerk.

State of New York }
County of New York } ss.:

G. W. THOMAS being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

G. W. THOMAS

Subscribed and sworn before me this 6 day of September, 1930.

B. L. REHBERGER
B. L. REHBERGER
Notary Public, Kings County
Certificate filed in all Counties
Kings Co. Clerk's No. 399, Reg. No. 1041
Bronx Co. Clerk's No. 19, Reg. No. 3171
New York Co. Clerk's No. 79, Reg. No. 1-R-91
My Commission Expires Mar. 30, 1931.

25 American Surety Company of New York

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 15, 1929, at twelve o'clock noon.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees,
American Surety Company of New York.

Gentlemen:

"The Nominating Committee appointed by the Executive Committee of this Company at its meeting held Tuesday, November 13, 1928, for the purpose of nominating * * * Officers of the Company, * * * for the ensuing year and until their successors are elected, begs leave to report as follows:

"We nominate for * * * * *

Place	Resident Vice Presidents	Resident Assistant Secretaries
Springfield, Ill.	James A. Easley	H. L. Child
	E. S. Hodges	Arthur M. Fitzgerald
	J. H. Holbrook	Logan Hay
	Edward D. Keys	W. C. Kikendall
	W. C. Kikendall	Alvin E. Skoog
	Albert H. Rankin	R. Allen Stephens
	Latham T. Souther	Cecil L. Thomas
	R. W. Troxell	R. W. Troxell
	W. Staley Troxell	W. Staley Troxell

Whereupon, it was

"Resolved, That the Secretary be authorized to cast one ballot, on behalf of the Trustees present, for the members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee, for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, That the President, the Vice Presidents and the Resident Vice Presidents be, and they hereby are, and each of them is hereby, authorized and empowered to execute and deliver any and all surety bonds and undertakings for or on behalf of this Company, in its business and in accordance with its Charter; such bonds and undertakings to have in every instance, however, the seal of this Company affixed thereto, and to be attested by the signature of the Sec-
26 retary, an Assistant Secretary, or a resident assistant Secretary of this Company."

State of New York, }
County of New York, } ss.:

I, G. W. Thomas, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 29th day of April, 1931.

G. W. Thomas
Assistant Secretary

Endorsed: Filed May 4, 1931 R. G. Moore, Clerk.

27 And Afterwards To-wit on the 4th day of May, A. D. 1931, the same being one of the term days of the May Term, A. D. 1931, of the Sangamon County Circuit Court, the following proceedings were had and entered of record to-wit: Removal Or

John Pokora *Plaintiff*
vs.
The Wabash Railway Company, a corporation *Defendant* } Case

This day comes the defendant by its attorney and presents its petition, notice and bond for removal of this cause to the United States District Court for the Southern Division and the Court having heard the said petition and being fully advised, grants the prayer of the said petition, approves the bond and grants and approves an order removing this cause to the United States District Court, a copy of said order being as follows, to-wit:

28 State of Illinois
County of Sangamon } ss.

IN THE CIRCUIT COURT OF SAID COUNTY

To the May Term, A. D. 1931.

John Pokora,
Plaintiff
vs.
The Wabash Railway Company,
a Corporation,
Defendant
} Case

This Cause coming on for hearing upon Petition and Bond of the Defendant herein, for an Order transferring this cause to the United States District Court for the Southern District of Illinois, Southern Division and it appearing to the Court that the Defendant, has filed its Petition for such removal in due form of law, and that the Defendant has filed its Bond duly conditioned with good and sufficient surety as provided by law, and that the Defendant has given Plaintiff due and legal notice thereof, and it appearing to the Court that this is a proper cause for removal to said District Court:—

Now, Therefore, Said Petition and Bond Are Hereby Accepted and It Is Hereby Ordered and Adjudged that this cause be and it is hereby removed to the United States District Court for the Southern District of Illinois, Southern Division, and the Clerk is hereby directed to make up the record in said cause for transmission to said Court forthwith.

Done in open Court this 4th day of May, A. D. 1931.

CHAS. G. BRIGGLE
Judge

29 State of Illinois
Sangamon County } ss.

I, R. G. Moore, Clerk of the Circuit Court within and for the County of Sangamon, in the State of Illinois, and keeper of the records and seal of said Court, do hereby certify that the foregoing is a true, perfect and complete Transcript of the record and proceedings now remaining in my office, in a

certain cause in said Court on the Law side thereof, wherein John Pokora is Plaintiff and The Wabash Railway Company, is Defendant, a corporation as the same appears from the records and files of said Court in my office remaining.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at Springfield, this 11th day of May, A. D. 1931.

R. G. MOORE,
Clerk

L S

Endorsed: Filed May 12, 1931 S. T. Burnett, Clerk

30 And afterwards, to wit: on the 28th day of May, A. D. 1931, there was filed in the office of the clerk of said court, certain pleas on behalf of the defendant in said case, which said pleas are in the words and figures, following, to wit: Filed May 28,

31 IN THE UNITED STATES DISTRICT COURT

Southern District of Illinois.

John Pokora, *Plaintiff*
vs.
The Wabash Railway Company, a corporation, *Defendant* } Gen. No. 18189

PLEA TO DECLARATION.

General Issue.

And the defendant by Allen & Converse its attorneys comes and defends the wrong and injury when etc., and says that it is not guilty of the said supposed grievances above laid to its charge or any or either of them in manner and form as the plaintiff has above thereof complained against the defendant; and of this the defendant puts itself upon the country, etc.

First Special Plea to Declaration.

And for a further plea to each and every count of the plaintiff's declaration the defendant says actio non because it

says that the injury and damage to the plaintiff and the automobile operated by him was the result of the negligence of the plaintiff and this it is ready to verify, wherefore, etc.

Second Special Plea to First and Second Counts of the Declaration.

And for a further plea to the First and Second Counts of the declaration the defendant says actio non because it says that the damage and injury to the plaintiff and the automobile operated by him was the result of the contributory negligence of the plaintiff and this the defendant is ready to verify, wherefore, etc.

Third Special Plea to the Third Count of the Declaration.

And for a further plea to the Third Count of the Declaration the defendant says actio non because it says that
32 the plaintiff wilfully and with reckless and conscious disregard of his own safety and of the automobile operated by him and of the safety of passengers and employees upon trains of defendant which he knew might be approaching upon the tracks of defendant at the said crossing in the Declaration mentioned, approached and went upon said crossing without stopping, looking or listening for an approaching train at a place where he could see and hear an approaching train and without exercising any reasonable precaution to discover the approach of a train upon said tracks; and that the conduct of plaintiff in so approaching said crossing was willful and wanton and contributed to the injuries and damages complained of by the plaintiff; and this the defendant is ready to verify, wherefore, etc.

Fourth Special Plea to Declaration.

And for a further plea to that portion of each count of said Declaration, charging the defendant with liability for the damage to the automobile in question, defendant says actio non because it says that the plaintiff did not then and there own and lawfully possess said automobile as his own individual property nor did he then and there have any right, title or interest in and to said automobile; and this the defendant is ready to verify; wherefore, etc.

ALLEN AND CONVERSE
Attorneys for Defendant

Endorsed: Filed May 28, 1931 S. T. Burnett, Clerk

33 And afterwards, to wit: on the 15th day of September, A. D. 1931, there was filed in the office of the clerk of said court, plaintiff's replication to defendant's first plea (general issue) and a demurrer to defendants first, second and third special pleas, and replication to defendant's fourth special plea, which said replications and demurrers are in the words and figures, following, to wit: Filed Sept. 17, 1

34 (Caption)

REPLICATIONS AND DEMURRERS TO PLEAS.

Replication to the Plea of the General Issue.

And the plaintiff, as to the plea of the general issue heretofore pleaded by the defendant, whereof it puts itself upon the country, doth the like.

Demurrer to First Special Plea.

And the plaintiff, as to the first special plea of the defendant by it above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar him, the plaintiff, from having his aforesaid action; and that he is not bound by law to answer the same; and this he is ready to verify; wherefore, for want of sufficient plea in this behalf the plaintiff prays judgment, and his damages, etc., to be adjudged to him, etc.

And the plaintiff demurs specially to the said first special plea of the defendant and as cause for said special demurrer shows to the court here that said plea purports to alleged contributory negligence on the part of the plaintiff as to all three counts in the said declaration of the plaintiff contained, whereas as matter of law, contributory negligence on the part of the plaintiff is not a defense to a charge of willful and wanton injury inflicted upon the plaintiff by the defendant as alleged in the third count of said declaration, and that
35 he is not bound by law to answer the same; and this he is ready to verify, etc.

Replication to Second Special Plea.

And the plaintiff, as to the second special plea of the defendant by it above pleaded, says that he, plaintiff, ought not by reason of anything in that plea alleged, to be barred from having his aforesaid action, because he says that the damage and injury to the plaintiff and the said automobile then and there operated by him was not the result of contributory negligence on the part of the plaintiff, and that this he puts himself upon the country, etc.

Demurrer to the Third Special Plea.

And the plaintiff, as to the third special plea of the defendant by it above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar him, the plaintiff, from having his aforesaid action; and that he is not bound by law to answer the same; and that the is ready to verify; wherefore, for want of sufficient plea in this behalf, the plaintiff prays judgment, and his damages, etc., to be adjudged to him, etc.

And the plaintiff demurs specially to the third special plea of the defendant and as cause for said special demurrer undertakes to show to the court that willful and wanton conduct on the part of the plaintiff contributed to the injuries and damage complained of by the plaintiff as a defense to willful and wanton conduct of the defendant alleged against it as set forth in the third count of the plaintiff's declaration; and the plaintiff shows to the court here that the said allegations in the third special plea contained do not, in law, constitute a defense to the charges set forth in the third count of said declaration, and that the plaintiff is not bound by law to answer the same; and this he is ready to verify, etc.

Replication to Fourth Special Plea.

And the plaintiff as to the fourth special plea of the defendant, says that he, plaintiff, ought not by reason of anything in that plea alleged, be barred from having his aforesaid action, because he says that the plaintiff did then and there own and lawfully possess said automobile as his
36 own individual property and did then and there have

right, title and interest in and to said automobile; and of this the plaintiff puts himself upon the country, etc.

C. S. ANDRUS
Attorney for Plantiff

W. ST. J. WINES
Attorney for Plaintiff

Filed September 15, 1931 S. T. Burnett, Clerk.

37 And afterwards, to wit: on the 16th day of October, A. D. 1931, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered Oct. 16

* * * (Caption) * *

Friday, October 16, 1931.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

This cause coming on this day to be heard upon the demurrer of the plaintiff to certain pleas of the defendant and upon the motion of the defendant to carry tht said demurrer to said pleas back to the third count of the declaration herein, and the court having heard the arguments of counsel thereon and not being fully advised in the premises takes the matter under advisement.

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38 And afterwards, to wit: on the 27th day of January, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit: Entered Jan. 27

* * * (Caption) * *

Wednesday, January 27, 1932.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

This cause coming on further to be heard and the court having heard the arguments of counsel, it is ordered that the motion of defendant to carry demurrer to plea back to the

third count of the declaration and sustain the same, be, and is hereby denied. It is further ordered by the court that the demurrer of plaintiff to the first special plea of defendant be and is hereby overruled and that the demurrer to the third special plea of defendant be, and is hereby sustained.

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39 And afterwards, to wit: on the 22nd day of June, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit:

22, 1932.

* * * (Caption) * * *

Wednesday, June 22, 1932.

Court met pursuant to adjournment.

Present, the Hon. Louis FitzHenry and the Hon. Chas G. Briggle, Judges.

Comes now the plaintiff, by W. St. John Wines, Esq., his attorney, and comes also the defendant, by Allen and Converse, its attorneys, and issue now being joined, the following named jurors are tendered and accepted, to-wit: S. J. Dorsey, Clive Erisman, Paul Gabble, J. R. King, Lord Merriell, Paul Aufdenkamp, H. A. McLean, Leo Humphrey, Mark Smith, R. C. McAtee, Wilson Mills, H. Bice, who are duly sworn to well and truly try the issues in this case and true verdict render according to the law and the evidence. And after hearing part of the evidence in the case, the hour for adjournment having arrived, the further trial hereof is continued until 10 o'clock A. M. tomorrow.

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40 And afterwards, to wit; on the 23rd day of June, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit:

(Caption)

Thursday, June 23, 1932.

Court met pursuant to adjournment.

Present, the Hon. Louis FitzHenry and the Hon. Chas. G. Briggle, Judges.

Come again the parties to the above-entitled case, and offer the balance of the evidence, for plaintiff, herein; whereupon the defendant by its attorneys enters a motion for a peremptory instruction to find the defendant not guilty; and after hearing the arguments of counsel, it is ordered by the court that said motion be and it is allowed, and the jury is instructed by the court to find the defendant not guilty, and the verdict of the jury is so entered:

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41 And afterwards, to wit: on the 5th day of July, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit:

(Caption)

Tuesday, July 5, 1932.

Court met pursuant to adjournment.

Present, the Hon. Louis FitzHenry and the Hon. Chas. G. Briggle, Judges.

On motion of the plaintiff by W. St. J. Wines, his attorney it is ordered by the court that said plaintiff have thirty (30) days to file bill of exceptions in the above-entitled case.

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42 And afterwards, to wit: on the 1st day of August, A. D. 1932, the following further proceedings were had in said court in said case and were entered of record, to wit:

(Caption)

Monday, August 1, 1932.

Court met pursuant to adjournment.

Present, the Honorable Louis FitzHenry, Judge.

Present, the Honorable Charles G. Briggle, Judge.

This cause coming on this day to be heard upon the motion for judgment on the verdict herein and the court having heard and duly considered the same, it is ordered that said motion be, and is hereby allowed. Judgment on the verdict, against the plaintiff and in favor of the defendant and for costs.

It is therefore considered and adjudged by the court that the said defendant do have and recover of and from the said plaintiff, its costs and charges by it about its defense in that behalf expended and that execution issue therefor.

Upon motion of the plaintiff by his attorney, it is ordered by the court that said plaintiff have thirty days in which to prepare and file his bill of exceptions herein.

43 And afterwards, to wit: on the 29th day of August A. D. 1932, there was filed in the office of the clerk of said court, a certain Original Bill of Exceptions (Narrative Form), which said Original Bill of Exceptions (Narrative Form) is in the words and figures, following, to wit:

44 (Caption)

ABSTRACT OF BILL OF EXCEPTIONS.

Appearances:

W. St. John Wines, Esq., Springfield, Illinois, Appearing for the Plaintiff,

Henry A. Converse, Esq., Springfield, Illinois,

Walter M. Allen, Esq., Springfield, Illinois, Appearing for the Defendant.

Filed Aug 29 1932, S. T. Burnett, Clerk.

45 WADE SEELEY:

2 My name is Wade Seeley, I have been a civil engi-
3 neer and surveyor continuously for 27 years, and was formerly engineer for the city of Springfield. Yesterday I made a plat of the intersection of Tenth & Edwards Streets in this city. The buildings there represented are correctly located and the measurements indicated are true and correct. Plat introduced in evidence without objection.

4 On request of counsel for plaintiff the witness exhibits the plat to the jury.

5 Plaintiff's exhibit No. 1, being the plat just mentioned.

JOHN POKORA:

6 John Pokora, plaintiff, 51 years old, born in German, lived in this country 30 years, and groceryman at 2214
7 East South Grand Aveuue. That was my business on August 17, 1929. I have a ice house about 20 feet from the grocery store and sell ice to the public, two or three loads a day, nine blocks to a load.

8 On August 17th, I left home in the morning at 15 minutes to six, driving my Federal truck which I had owned for two years. I was at the ice house at Tenth & Ed-
9 wards five minutes to six and there were a good many trucks there and I thought I would go across the railroad where there is another ice house. I was stopped there, and I cannot stop about forty minutes, and I can not hear no whistle blew, no heard no bell ring, no watchman, and the box cars was sat right at the crossing here, the box car on this side was, and I just look and see nothing, and I was high up, you know and could not see nothing, of course everything clear was, and I no even hear any engine coniing, and at that time I can hear pretty good; I could hear good at that time, and I no can hear nothing. So I blow my whistle; I thought the watchman was over there, and nobody answered to me, so I just started the truck and go across the track, and that is as far as I know. I saw nothing and that is
46 all I know; I can not see no engine or nothing; I can not see nothing or hear anything; I suppose it go so fast I no hear nothing.

Mr. Converse: I object to his conclusion.

The Court: Sustained.

The Witness: And what hit me, I don't know what hit me even.

10 There were box cars on three tracks there. There are four tracks there. The box cars were on the two first ones and the last one, so far as I can see. (Plat exhibit
11 showed to the witness.) The cars were on the first track and on the second. The cars were within about two feet of the crossing.

Q. What happened to you after the train struck your truck?

12 A. Well, so far I can see, I was dead, I don't know nothing about it. I find myself in St. John's hospital in two weeks. I stayed there five months and twenty-four days. Doctor I. W. Metz, of Springfield, attended me.
13 So far as I can see I can not walk, you know. My legs were mashed up and cut up; about a dozen bones out of this leg, it was and about a dozen out of here; two holes in this leg and two holes in this leg (indicating) not healed up yet.

Mr. Wines asked permission to exhibit the scars to the jury but on objection by Mr. Converse the objection was sustained, to which ruling Mr. Wines duly excepted.

Mr. Wines: Were you hurt any where else besides in the legs?

The Witness: Well, I was; I believe I was torn up
14 every place, my head, I cannot see, I cannot hear; I can hear one half and I can see one half; I was mashed up every where. Before I was struck by the train my hearing was good. Since then it is not very good. Before I was struck my eye sight was good, now I can see just about half way, that is all. Since I got out of the hospital I no can work yet, just drive the truck, like this, I
15 no can work like I use to do. I was laid up about a year and a half before I could drive a truck or car. I no can wait on the trade or anything like that, I cannot stay on my legs too long; I no can see very good so I no can see and do nothing in my business at all; In August it will be three years.

16 I bought the truck from Fred Sharafin, new, for
47 $1500.00. I give eleven or twelve hundred dollars and a Ford truck. After it was struck I had it

moved in my side yard where it is now. It is not fixed
17 at all, it is just a wreck, kindling. As a result of my injuries I have suffered all the time. I got pains right now, all the time, never leave. Pains are in my legs, head, back, and everything.

I stopped my truck about ten or fifteen feet from the crossing, from the first truck.

Cross-Examination by Mr. Converse.

18 I live at 2214 East South Grand Avenue. I have a grocery store and a separate ice building there. I furnish ice out in that territory and it takes about three truck loads of ice a day. I come to town three times a day, sometimes four times, have for nine or ten years.
19 Have gotten my ice at the C. I. P. S. Sometimes my boys go for the ice but I went most of the time. That day was fair week and I was afraid they got so much work to do I left the grocery store to mine woman and I go myself after the ice. Other days during the summer I would go for ice about seven or half past seven o'clock. Sometimes when I see no ice I would go down at six
20 o'clock. I did that for several years. Sometimes I went to the ice house on the east side of the tracks and sometimes to the other one. If they were busy on the east side I would go across to the west side. I did that more than hundreds of times. I have seen that passenger train go through.

21 Q. You have seen the train go through at six o'clock?

A. No, not six o'clock; it was too late at that time; that is the reason I got hit; it was too late.

Q. Oh, it was late that day, was it?

A. It was late. I don't know whether there was a passenger train every day over the Wabash at six o'clock, I no pay any attention to the train or anything; I was just calling for the ice. I had seen that train go
22 through many times on other days. Sometimes it blow whistle and sometimes not. Sometimes I go early and sometimes not. There is a driveway that runs out
48 and around a loading station on the east side of the Wabash, but I didn't go on in, I go to the other one,
23 it was too full. I did not stop at the drive way, I stopped at the crossing. I did not wait to get my ice on the east side because no trucks got out and I don't

24 want to stay all day there. I decided that instead of getting my ice on the east side I wanted to cross the road when I see them no move. I knew there was a railroad track there, I had crossed it lots of times and had crossed
25 it early in the morning before, about six o'clock. Sometimes there was a watchman there and sometimes not, I just pay attention to the watchman; Often I didn't see a watchman, after seven o'clock he was there. I was going along on the north side of Edwards Street, near
26 the north curb and was looking straight west.

Q. Could you have seen a train if one had been coming from the north?

A. No.

Q. Why not?

A. I cannot see nothing; I no can see anything, the building was there and the box cars here, and I cannot see nothing. It was a two or three story brick building on the north side of Edwards Street, close to the street,
27 right on the corner, of the Wabash track. No can see by the building; No can see by the box cars. The side track was loaded. The first track had some cars standing on it. I stopped about ten or fifteen feet before I
28 got to the first track. I stopped the truck, but not the engine.

Q. You didn't get out of your truck, did you?

A. I looked out.

Q. You didn't get out?

A. I just stopped like that and looked.

Q. You stayed right in there?

A. Yes sir.

The truck had a cab on it and I was sitting on the south
29 side of the cab. After I stopped my automobile I listened and heard nothing at all. I looked to the north and to the south, every way, and when I looked to the north I
49 didn't see nothing at all. The building wasn't so bad, the box car was in front of me close to the crossing and shut off my view. That is the reason I cannot see it. I could not look to the north and see anything of a train coming from the north. I stopped about ten or fifteen feet east of the first track and looked,
30 to the north and I could not see any where up the Wabash track at all because the corner of the building and the box car on the first track kept me from seeing up the track. Then I started my car up again. I did

not see the train at all. The next thing I know I was
31 in the hospital. I have never seen the train. I don't know what hit me. All I know about it was what people tell me. I was found over to the south. There wasn't any crossing watchman there. Nobody signaled nothing.
32 Nobody gave me any motion to come on. Nobody was in front of me that day just some people in back of me.
33 I just had that one Federal truck. I owned the truck. I bought the truck myself. I have been living at 2214
34 East South Grand Avenue 28 years in October. I moved there about 20 years ago and before that I lived in the other house just about two houses away. I have lived at 2214 twenty years. My business the last ten years has been groceryman, meat and hay, and in the slaughter
35 house business. I killed and butchered at 2214 and was in the ice business, that is all.

Q. During the last ten years you have not been in any other business except what you have told the jury of?

A. I have been about nine years in the ice business.

Q. Now during the last ten years have you lived continuously at 2214 East South Grand Avenue?

Mr. Wines: I object to that as immaterial. I think perhaps the Court knows what this is leading up to. I think it is entirely immaterial and not cross examination.
36 I would like to speak to the Court privately and with Mr. Converse before anything further is asked.

The Court: All right, we will step into the next room.

Mr. Wines: The purpose of this is to show conviction for selling liquor. You told Pokora the last time you had him that the next time he came up you were going to send him to Leavenworth for two years, and he said,
37 "Judge, I will never be here again." This has all
50 been a long time ago and he has not been bootlegging since long before this accident and I think it is prejudicial to try to show this jury that he was convicted at one time in this Court.

The next five pages contain the informal discussion which took place in the Judge's chambers and at the conclusion of that part of the discussion the Court states, on page 41, "I think I will let you make your offer and sustain the objection."

Mr. Converse: Well then I offer to prove that this plaintiff was found guilty of contempt of court by the
42 District Court in the Southern District upon two occa-

sions and that the plaintiff was found guilty of contempt of court by violating an injunction restraining him from selling intoxicating liquor n volation of the National Pro hibition Act.

43 Mr. Wines: To which I object.
The Court: Objection sustained.
44 The Court: Anything further Mr. Converse?
Mr. Converse: Believe that is all.

45 MIKE USHMAN:

My name is Mike Ushman and I live on Rural Route
46 No. 3, am a coal miner and know John Pokora. I remember when he was hurt on August 17, 1929, at Tenth & Edwards Street in this city. I was driving my car and was right behind Pokora about six o'clock in the morning. Pokora was driving on the north side of the street, as he approached the Wabash tracks. He stopped there
47 right before he got to the track, I would judge around 10 or 15 feet. Then he went ahead. All at once I heard a crash; I heard a crash and that is all I can tell; it happened so quick that I really don't know myself. I stopped my car when he stopped his car. I didn't hear any whistle
48 sounded by the train, or any bell. I could not say how fast the train was going. It run a long ways down there to the south after hitting him. I guess the back end of the last coach was five or six hundred feet south of the Edwards Street crossing. I jumped out of my truck and went to see who it was and recognized him when
51 he was laying there. He was on the east side of the Wabash track. The truck was on the south side of
49 where he was laying. I thought he was dead. I stayed there maybe about 10 minutes. I drove away before the ambulance came. I have seen the truck since. It was all banged up, the engine all broke up, and the body all crushed; it was just junk.

Cross-Examination by Mr. Converse.

I have known Pokora about 25 years, we used to work
50 in the mine together years ago. I do not have much trade with him at his place, just a little. At the time John was
51 struck I was on Edwards Street coming in on 11th Street.

John was in front of me. I followed John west on Edwards Street from 11th Street. I could not say whether John tried to go in the ice house on the north side of Edwards Street. He was looking in there, but I don't know what his intention was. I didn't know it was John
52 ahead of me until after he got hit. His truck had a cab on it and he was sitting on the left hand side. To the best of my recollection he didn't stop at the ice house, but went by slow, looking in there. I was 30 or 35 feet behind him. He went out up toward the track and stopped there, about 15 feet or so, maybe more or less, from the
53 east track and that track had some cars on it. He stopped for about a minute or two. Sure, he stopped. He was ahead of me and I could not go past him. I got within about ten or fifteen feet of him and then he started up and I started up and followed right along behind him.
54 The first I knew there was going to be an accident was when I heard the crash. The train hit John, not John hit the train. I stopped my car, jumped out and ran
55 right over to him and looked at him for four or five minutes. While that was going on I wasn't paying any attention to the train. I really don't know where the train did stop.

Re examination by Mr. Wines.

The Witness: I saw those box cars standing on the two tracks right close to Edwards Street, right close by the sidewalk.

56. *Recross Examination by Mr. Converse.*

I first noticed those cars when I stopped there waiting for him to get away so that I could go across. They
57 52 were right around eight or ten feet from the sidewalk. I didn't look at them again after the accident.

HENRY BUCKHOLDT:

I am 11 years old and at the time John Pokora was
58 hurt, lived on the corner of 11th & Edwards, at the north east corner. My father ran a pie bakery there underneath where we lived. I know John Pokora and saw him

go by my father's place on the morning he was hurt about six o'clock. He was going west on the right side of
59 Edwards Street. I was out in front of our bakery. It was the first day of the State Fair. I was going with the driver that morning and was waiting for him to come. I watched Mr. Pokora as he went west. He went up to Tenth Street where the railroad is. He stopped before starting across the tracks, then he started across and the
60 train hit him. The train was going south. After the train hit him I ran over there as fast as I could. Mr. Pokora was lying by the switch on the east side of the track. I thought he was dead. I didn't stay very long. I just looked at him and ran back home. I did not hear
61 any bell or whistle that morning on the train.

Q. Do you think you could have heard or would have heard it if it had been sounded?

Mr. Converse: We object to that, if the Court please; this boy was a block away.

The Court: Sustained.

(To which ruling of the Court, the plaintiff, by his counsel, then and there duly excepted.)

The Witness: Yes sir.

Mr. Converse: I move that the answer be stricken.

The Court: The answer may be stricken.

(Exception by Counsel for plaintiff.)

Cross-Examination by Mr. Converse.

62 I will be 12 years old on July 30th. The accident hap-
63 pened the first day of the fair three years ago. I saw him in his automobile and knew it was John Pokora. My dad used to make him on the pie route and he would take me along with him sometimes. I have been to Mr. Pokora's store. He was one of my father's customers. I am sure I saw him stop way up there at Tenth Street.
64 53 There was another car right behind him, and they both stopped. I was just looking toward the ice plant and was talking to my aunt and saw the train come along and saw this accident.

HENRY A. BUCKHOLDT, SR.:

I live at 526 South Eleventh and am the father of the boy who was just on the stand. I did not see this accident or any part of it. I have lived there prior to this accident for about ten years. I am familiar with that Wabash train that goes south at about six o'clock in the morning. I can ordinarily hear a whistle when they blow it and if they ring the bell I can hear the bell. I did not hear any bell ringing or a whistle sounded on the morning that something struck Mr. Pokora.

Cross-Examination by Mr. Converse.

I was checking out the drivers that morning. I heard the noise of the train, but I never heard any whistle. I think I heard the train rumbling. At the time I heard the crash I was checking the drivers who were in the store with me. Only one driver was in the store and I was going over his sheet of customers. We were talking at the front door and I was checking up his customers. I did not have a pencil in my hand, I was just looking at the figures on the sheet. I did not know that Pokora was in the neighborhood. He is a customer of mine and had bought pies from me a good many times. After this accident happened John came and asked me about it, about a year after that, that was the first time he talked to me about it.

HENRY ROY:

I live on Rural Route No. 7 up towards Rochester. I know John Pokora, when I see him. At the time that train came along I was just to the east of the drive at the ice house on the east side of the railroad track. The ice house is on the northeast corner of Tenth & Edwards and I was east of the tracks. I saw Pokora's car pass and there were two or three cars ahead of me standing there. I was driving my own car. Pokora's truck was nearest to the railroad tracks ahead of me. The cars were stopped, yes sir, absolutely stopped. When they started up I was going west on Edwards Street myself. I guess he didn't get in the middle of the track

until the crash came. I stopped my car and jumped out. If there was a whistle blown I didn't hear it. I didn't hear a bell ring. I should judge the train stopped maybe
73 100 or 150 feet south of the crossing. It was a passenger train. Pokora's truck was thrown off on the east side of the track and Pokora was lying kind of southeast. I ran up there and if he hadn't been breathing I would say he was dead. I stayed until the ambulance came. I am not that good with mathematics to tell how fast the train was coming, but I know it caused an awful crash.

Mr. Converse: Objection to the answer as not responsive.

The Court: It may be stricken.

74 *Cross Examination by Mr. Converse.*

At that time I was working at 19th & Jefferson in East Springfield. I came along at six o'clock that morning to let my wife out at Mr. Buckholdt's. She was working there during fair week. The first I saw of Pokora that morning he was lying on the ground. I had seen his car ahead of me. There were two cars between my car and his car, I was the third car back. I did not go up to the
75 ice plant at all. I could not say who had the car right ahead of me. I had stopped. I was just driving along and could not run over the other cars. I didn't stop, but I slowed up and when Pokora and them started up the train hit his truck and I left my car standing in the middle of the street and jumped out and ran up to where he
76 was. I was driving a Model "T" ford and when it
77 started up it made the usual noise. It is a pretty noisy car, a poor man's car. I sure saw the train when it hit him. I noticed the train as soon as the conductor came back with pencil and paper in his hand and was taking names. He did not get my name because I ducked. I
78 don't like to be in a trial. Afterwards they laid Pokora on a stretcher and put him in an ambulance and I left.

Q. Now if you "beat" it when the conductor was trying to get some witnesses how do you happen to be here as a witness now if you don't like to come to court?

A. I was subpoenaed. I don't know how I hap-
55 pened to be in this trial or who told them I knowed anything. I never talked to anybody about this case. I did not talk to Pokora. I have talked to nobody. I was

79 subpoenaed on the 22nd by the gentlement with red neck time. He found me at my house. I do not know how he came to be out there to pick me up as a witness.

OTTO GOETZ:

80 I am tank man for the Central Illinois Public Service Company, the ice company at 10th & Edwards Street, and was working there the morning that John Pokora was struck by a train. I had charge of the platform and was loading out the drivers. I did not hear the crash when the train hit Pokora. I could not hear the crash on account of the scoring machine was running and it makes very much noise. My attention was attracted to the fact
81 that Pokora had been hit when the drivers ran out. The drivers called "accident" and I jumped off and went down there. Pokora was lying on the east side of the track, his truck was lying there by the track. I helped pick Pokora up and he was covered with cinders and blood all over him and we took a cushion out of the truck and placed him on it. One fellow called an ambulance and I went back and called his son and then I came back again to the place of the accident to pick up his ice tickets. Pokora was in the habit of getting ice there in the morn-
82 ings. He stopped there at the corner of the engine room to try to get a load of ice on the east side of the railroad track. Our drivers were so crowded there at the platform that I waved him up and told him he would have to wait about twenty minutes until all the drivers were loaded out. He wanted to get across the track and get his load of ice at the other plant. I did not notice whether he stopped before he got across the track, but he stopped right at the engine room. I am sure of that and he wanted to back into the platform.

Cross-Examination by Mr. Converse.

I was working at the ice house on the east side of the
83 Wabash. That building is flush with the sidewalk on Edwards Street and is flush with Tenth Street. The
56 place where they come in to load ice is around fifty
84 feet from the corner of the building I imagine. (The plat shown to the witness by Mr. Converse, who called at

tention to the platform, alley and other matters shown on the plat.) The wholesale platform where I was standing is about forty feet north of the sidewalk and on the east side of the U. P. S. ice plant. This is where I stopped Pokora. The trucks were lined up so that I could not let him in at that time. I told him he would have to wait about twenty minutes and he wanted to know if he could get his ice quicker across the street. He didn't say he was in a hurry but asked if he could get it quicker over there than wait here so long and I told him that I thought he had better than to wait by the time we got all of the trucks loaded. I told him I believed he could get his ice quicker across the street. He left and drove out on Edwards Street going west. I don't know if there was anybody behind him. The whole platform around there was parked with trucks; I could not see that. He disappeared from my sight and I went back to my business.

There was a great deal of noise around there. The old type scoring machine is what made so much noise. Sometimes you can't hear yourself talk. You can hear that scoring machine pretty well. There are eight saws on that scoring machine and when that machine is running you cannot hear nothing then, especially when you stand right close to it. I would say the noise from those saws could be heard a block away. A kind of a singing noise. I didn't hear the crash at all. The scoring machine at that time was inside of the building, now it is outside. Sometimes I would leave the doors open when I come out to make the charge tickets for the drivers. The scoring machines are working when the people are up there loading, because they have to keep cutting off chunks of ice for them. It was a busy morning. That is the reason I told John he could get a load quicker on the other side. John had been in the habit of coming to the platform for ice and he frequently came around six o'clock in the morning. When he is out of ice at home he comes about six o'clock. He has to get ice as quick as he can and get his ice house filled up.

93 57 DOCTOR IRVING METZ:

I have been a physician for thirty years, practicing in Springfield. I was called to attend John Pokora for in-
94 juries received by him August 17, 1929. I first saw him at St. John's hospital around 6:30 o'clock. He had a
fracture at the base of the skull, extending back along
58 the parietal margin and in to the occipital region, which is the back. He had a comminuted fracture of the right leg at the junction of the upper and middle third; a compound comminuted fracture of the left leg at the juncture of the lower and the middle third; he had a rupture of the ear drum, and numerous bruises and abrasions over the body. We immobilized the fractures, gave them emergency treatment; we placed him in bed with the head elevated; we applied ice to the head to check the hemorrhage from the ears, and gave him opiates to keep him quiet. I cannot say how long I treated him at the
95 hospital as I did not bring my memorandum. The hospital has the records, but they don't like to have us take them away. I saw him practically every day; at first, several times a day. After he was removed to his home he came to my office. I think at first he came every other day and then he came less frequently so that I should say once a week, and then every two or three weeks.

96 X-Ray pictures were taken at the hospital and I have them with me. (Witness produces X-Ray films). These (indicating) are the first pictures of the legs that were taken before any reduction was made. Exhibit No. 2 shows the condition of the bones before I set them. Ex-
97 hibit No. 3 is a view after the plates were inserted, a front view. (The films offered in evidence after submission to opposing counsel. The Doctor then exhibited the films to the jury, holding them before the light and explained them.) The witness continued:

This picture shows a shattering of the bones in the right leg. This (indicating) is the left leg, showing the displacements, some overriding of the parts, and the fracture of the smaller bone again, the fibula.

(The Doctor then showed the jury Exhibit No. 3 and 4 and explained them.) Exhibit No. 4 was taken after we
98 used the steel plates, called Lanes plates. These (indicating) are on the right leg, the steel plate after you put

the screws in each end. That (indicating) is a picture of the fragments of the left leg, and we have that here. We ignore this little bone, the fibula, because it takes care of itself, and we don't have to be so careful about that. Exhibit No. 5 was taken probably six weeks
59 after the plate was inserted, to show the change that had taken place with the pressure of the plate that is exerted on the fragments. Then six or seven weeks later that is the appearance of the leg. You will see the difference. Exhibit No. 4 shows the left leg when the
99 plate was inserted.

The Court: You mean the picture in your left hand?

The Witness: In my right hand. The one in my right hand is Exhibit No. 4 when the plate was inserted and the one in my left hand is six weeks later.

Mr. Wines: Now Doctor have you the pictures of the fracture of the skull and if so will you produce them?

(Witness produces X-ray films.)

The Witness: There again we take a front and a lateral view. These pictures were taken by Doctor Bain,
100 the Pathologist at the laboratory. He has been connected with St. John's Hospital as X-Ray Pathologist for ten or fifteen years to my personal knowledge; before that he was the bacteriologist for the State. The pictures of the legs have been in my possession since they were taken. I use them to keep in touch with the case. Exhibit No. 7 is an anterior-posterior view showing the fracture over the base extending up the back through the parietal region in the direction of the occipital. Exhibit No. 8 is
101 the lateral view, showing the line of cleavage of the fracture along there. Pokora's ear drums were ruptured. (X-ray pictures admitted in evidence without objection.)
102 The witness then identified the bill from St. John's hospital, total $617.99 for services rendered to Pokora, as the usual and customary charges for like services. (Same admitted without objection.)

The Witness (Continues): My bill against Pokora for treatment furnished by me to him as a result of his injury is $800.00 and is the usual, ordinary, reasonable and customary charge for like service. The injuries received by Pokora would be painful.

Q. Have you any idea personally how much pain and suffering such injuries would cause. Is there any way you can tell the jury?

Mr. Converse: I object to that; I think that is going beyond the realm of proper examination.

Mr. Wines: I don't know whether he can or not; if he can not, he can say so.

The Court: The patient can tell that, not the Doctor. (Exception to the ruling by counsel for plaintiff).

The Witness (Continuing): I examined his legs last Saturday. They are healed, with the exception of a small opening in each leg, which exudes serum; and he tells me that about a week ago what we call a spiculum of bone came out of the leg, which sounds reasonable. Otherwise they probably would have been healed quite some time ago. A spiculum of bone is just a little sliver that is thrown off in cases of this kind. You understand, the bones were shattered, and practically none of those pieces were removed from the locus: the legs were plated with the fragments in sito.

Cross-Examination by Mr. Converse.

I was called immediately after the accident and have continued as Pokora's Doctor and surgeon ever since. I treated him for his legs, head and all of the different things. The spicula that come out are little slivers of bones and are not necessarily serious. I think Pokora has made a pretty good recovery. His right leg has practically recovered, but not 100% because there is still a fissure there, but I am satisfied that that will close up. I don't know how much he is lacking in his left leg.

Q. How much is he short of a full use Doctor?

A. I would say anywhere from sixty to seventy per cent.

Q. He has probably disability at the present time somewhere between thirty and forty per cent in his left leg?

A. Yes sir. My best judgment is that this disability will continue, but I cannot say definitely because I don't know how much injury has been done to the nerves controlling the muscles of the leg. Time will have to tell the story. The fractures in his skull have completely healed so that he has a god normal head right now, so far as the bony structure is concerned.

Redirect Examination by Mr. Wines.

61 If he is injured in walking I would attribute it largely to muscle weakness, due to the injury to the nerves, and atrophy of the muscles as a result of the nerve injury. "Atrophy" means shrinkage or deadening; it grows weaker and weaker and finally becomes useless.

108 DOCTOR ARTHUR E. WALTERS:

I am practicing eye, ear, nose and throat, in the Prince Sanitarium, and am a gradute of St. Louis University in 1905. I am occupying and maintaining the institution that was formerly occupied by Doctor Prince on Capitol Avenue and have succeeded to that business.

109 I examined John Pokora this morning at your request. He has a rupture of the left ear drum at the lower quadrant; he also has a rupture of the right ear drum at the upper anterior quadrant. I tested him out on his hearing. He could hear a watch tick on contact, that is against the ear. Normally he should be able to hear a watch tick at from twenty four to thirty inches. Both ears are affected.

(No cross-examination).

110 FRED C. SHARAFIN:

I sold a new Federal motor truck to John Pokora for about $1500.00. I saw it and examined it after it was struck by the Wabash train. It was beyond repairs; it could not have been repaired.

(No cross-examination).

111 JAMES B. YATES:

I have been an auto mechanic for five years. I saw the Federal truck belonging to John Pokora after it was struck by the Wabash train. The motor was busted, the frame was sprung, the cab was torn off, the radiator was ruined and the body was demolished. It was just a wreck, that was all. It was beyond repairs.

Cross-Examination by Mr. Converse.

I first saw it about two years ago. I was buying and junking automobiles and saw it in his back yard. I have traded with Pokora some for the last two months.

ROLAND BURRIS:

On the day that Pokora was injured at the corner of Tenth & Edwards Streets, I was living at 921 or 923, I forget which it is, anyhow, it is right across from the ice plant. On the north side of Edwards Street and west of the ice plant. There was a vacant lot between the house I lived in and the Wabash tracks. My house faced south. I was in the house at the time the train struck. My wife was on the front porch. I heard the brakes squeak on the train and my wife came running back in and said they had a wreck. I put on my shoes and walked over there.

Q. Did you hear the collision between the train and the truck?

A. Well, I didn't pay much attention to that.

Q. Did you hear any whistle or bell sounded by that train?

A. No, I didn't. Pokora was lying on the cushion when I seen him. The truck was lying a little south of him. The Wabash train was still south of them, the last coach was passed the south side of the sidewalk a little ways. I did not count the number of cars in the train.

Cross-Examination by Mr. Converse.

The house I lived in was about 150 feet west of the Wabash tracks. It was a double house, and I lived in the west side of the double house. I think I was in the kitchen about six o'clock in the morning. It was about breakfast time and my wife had gone out to get the paper. The first thing I knew I heard the squeaking of the brakes and then my wife ran in. I don't remember just what I was doing. I do not ordinarily help get breakfast. I did not have any chores to do. I was working at Abe Barker's Junk Yard. I have known John Pokora

about ten years. Once in a while I would see Pokora at the ice house in the morning. I would leave home before seven o'clock. Once in a while I would see Pokora on the west side of the track. I did not see anything
120 63 of the accident myself. The train was fifty or seventy-five feet south of the crossing. I never paid much attention to it.

Redirect Examination by Mr. Wines.

I noticed freight cars standing on the east track that morning. (Plat shown to the witness.)

Q. Can you show me on this plat how close they were to the corner?

121 A. It was just about along here (indicating).

Q. That is, your finger is about half an inch from this dotted line showing the building line; is that right?

A. Just a little west past the plant.

Recross Examination by Mr. Converse.

I think the freight cars were about six or eight feet from the sidewalk line, but I did not measure.

122 When I came across to where John was he was on the south side and I afterwards went back across Edwards Street to my house. I didn't go over to where those cars were, but when I came out to go to work I came out to Edwards Street and went down to the track and I noticed the car, after the accident. I was studying about the train, where it hit him at, and then looked to see if he could see down the right-of-way before he got up on the main track. I did not go over on Edwards Street sidewalk to take a look to see how far I could look. I
123 did not try to sight it and don't know if a man got on to the side track how far he could see down the main track.

MRS. EVA BURRIS:

I am the wife of Roland Burris, who has just testified.
124 On the morning that Pokora was hurt we lived at 923 East Edwards Street, right across from the ice plant, that is located on the southwest corner. We lived west

of the Wabash tracks and our front porch was on the south side of the house. I did not see the collision between the train and the automobile. My husband built the fire and I went out to get the paper. I reached down
125 and got the paper and stood on the front step and opened it. I noticed a man running across the street, toward the the railroad track and I saw the back end of the passenger train on the track and people running all ways up to the track. I went in and told my husband, but did not go over there. I did not hear any whistle blown or any bell rung on the train that morning. The back end of the train was just beyond the sidewalk on the south side of the cross.

126 I went over afterwards. I looked out of the window first and they were putting that man in the ambulance. There are always box cars sitting on the east side. There was a big box car sitting there because I and my husband stood talking afterwards together about how he got hit and we decided because he could not see—.

Mr. Converse: We object to that.

The Court: Sustained.

(Exception by plaintiff.)

127 The building is almost to the sidewalk and that car was right next to it.

Cross-Examination by Mr. Converse.

On this particular morning I was anxious to see what was in the adds. My husband built the fire, put the tea
128 kettle on and called me. I went out and got the newspaper and sat down on the front step and turned to the want add page. I hadn't got to it yet when I saw a man running. That is the first I knew of any accident. Yes, I heard the noise, but there is always the banging of
129 switching trains and switching cars all hours of the day and night there. I was used to the noise and that is the reason I didn't look up. When I looked up at the railroad train it had just cleared Edwards Street and from where I was sitting on the porch I could see the back end of the train and it was standing still. I ran in the house and told my husband about it.

130 I just heard the train coming and never thought to look up. I knew it went through, it was on time that

day. I could hear the train rumbling down the track as it came from the north towards Edwards Street.

Q. Well now isn't it a fact Mrs. Burris that it
65 might have been ringing a bell and you have been so used to it that you didn't pay any attention to it at all?

A. I was so nervous from hearing those bells all of the time and switching of trains I could always tell when I heard one.

Q. Well, isn't it a fact that you got so used to hear-
131 ing them that you didn't pay any attention to them part of the time?

A. Absolutely no; I have never lived by a railroad before; it was always switching trains and ringing bells all hours of the day and night.

M. R. HODGES:-

I am a salesman for the Springfield Produce Company, which is located on the northeast corner of Tenth
132 & Capitol Avenue, where I have been employed for about eight years. The Wabash passenger station is on Tenth Street between Washington and Jefferson Streets. Washington Street is at the south end of the station, the next street is Adams, the next Monroe, the next Capitol Avenue where I work. The next street south is Jackson and the next is Edwards Street.

133 Along the track going south there is just storage buildings, the Merchants Transfer on Tenth & Monroe, the Wabash Railroad office on the other side on the southwest corner, then we are located at Tenth & Capitol on the northeast corner where we have been for about ten years. The Wabash tracks are four blocks east of the
134 public square. Between the public square and the Wabash tracks seems to be a business section, not residential at all. The C. I. P. S. ice plant is on Tenth & Edwards.

I was at the Springfield Produce Company on the morning that the Wabash train came south and struck Pokora. He has been a customer of mine and I have been calling him for twenty years on the telephone
135 around six o'clock to see if they needed any produce. On this particular morning I called up and his wife answered and said that John got hit with the Wabash. I

called about 6:10 or 6:20, I observed the Wabash train going south that morning. As it passed the Springfield Produce Company I should judge it would be going anywhere from 25 miles an hour to 30 at least, like it was
136 making up time; it was past time. I didn't hear it
66 ring any bell or blow any whistle as it passed. I have got pretty good ears. It passes about twenty-five feet from my chair.

Cross-Examination by Mr. Converse.

I was not busy at my desk telephoning at the time that train went by. I was getting ready to get busy. I got
137 busy on the telephone about ten or fifteen minutes afterwards. I hadn't started using the telephone at that time, not when I heard it go by. My attention was attracted because it was going pretty fast. I figured the train was ten or fifteen minutes late. I didn't look at any clock. I had no reason to do so. I don't know anything about
138 the train stopping down below there at the Wabash shops. From Washington Street to my place of business it is four blocks; he got a pretty good start. It is three blocks. I mean to tell the jury that this train had started at the station and in running three blocks had gotten up a speed of twenty-five or thirty miles an hour. It didn't make any difference to me because it went fast.
139 I just naturally see it and watch it. I was watching out through the door which was wide open. I don't even have to turn my head. In sitting at my desk I face the south. I generally watch the train to see how much traffic is on the train, how much passenger service they have. The door is about three an a half or four feet
140 wide. You can see more than one coach, you can see pretty near the whole thing.

On this particular day I remember right after I got the report that this train went by and I didn't hear any
141 whistle; I know that. I didn't know that John had been hurt until his wife told me on the phone. It must have been at least fifteen minutes afterwards or maybe
142 twenty. She told me he was hit at Tenth & Edwards and I figured it was the Wabash train. That is the only train that could have hit him.

Q. Then you stopped right then and there and began to think how fast the train was going.

A. No, I never stopped and thought anything about it.

67 Q. Well then how do you know about it now.

A. Because I knew about it at that time, but I never thought about it, I knew about it; I did not have to think about it; it was pictured in my mind; there wasn't anything much for me to think about it, about how it was going. I knew it was late. It was the first day of the Fair Week and I knew it was late. I figured about ten or fifteen minutes late, because if it is on time it is 5:50. I have went on that train hundreds of times to
143 Mt. Sterling and Quincy. That is the time I always would be down there, so I would not be late. Very seldom it was on time, many a time I have waited on that train. I have not had any friction with the Wabash. I have been perfectly friendly. I would not say a word against them intentionally or unintentionally. As a rule they hit up pretty fast when they get up there. If the train is on time they didn't go so fast, but if they were a little short it sure looked like he was trying to catch up something.

144 From Washington Street down to Edwards Street there are warehouses, depots and storage house all the way down. Those business houses are built there so they can be on side tracks. We have a side track. I don't know whether it is the same way down at the C. I. P. S. ice house.

CLARENCE STANBERRY;

145. On the morning that John Pokora was hurt at the corner of Tenth & Edwards Street I was working at the C. I. P. S. Company on that corner. I was delivering ice and was driving one of their wagons. At the time Pokora's truck was struck by the train I was loading my ice cubes in the side of my little box. I was right next to Edwards Street. (Plat shown to the witness). At
146 that time we had a grinder that we ground our ice with that stood on this platform of this service station. At that time I was loading ice on the west side of the service station with my horses nearly out on Edwards Street.

My attention was attracted when I heard the train
68 hit Pokora's truck. I did not hear any whistle blown or bell rung. I could have heard it if it had been blown.

147 After the train struck the track I went over there and there were three or four more of us went over at the same time. Pokora was lying on the south side of the sidewalk on Tenth Street just on the east side of the rail road track. His truck was lying about ten feet south of where he was. To my best knowledge, just judging the distance, the rear end of the train was at least one hun-
148 dred feet down the track before it stopped. There are always box cars or freight cars standing on the east track there on the north side of Edwards Street. They were standing there that morning. I would judge the last car toward the sidewalk wasn't over four or five feet back. I didn't personally know Pokora. It was not my business to load his truck. I had no business to load anybody's truck, but my own.

Q. Give to the jury your best judgment as to how fast the train was travelling.

A. Well, I could not make a statement or estimation, but as to how far it was down the track it must have been running—

149 Mr. Converse: We object to that.

The Court: Sustained.

(Exception by counsel for plaintiff.)

Mr. Wines: Have you an opinion as to how fast it was running? Just answer that "yes" or "no"?

A. Yes.

Q. On what do you base that opinion?

A. From the distance it was down the track.

150 *Cross-Examination by Mr. Converse.*

When I was getting my ice cubes I was at the service station. I was out at the edge of the service building and there weren't any buildings between me and the Wabash tracks. If I looked to the northwest the building would
151 hide my view. The train was coming from the north. The train was stopped when I seen it. I was not paying any attention to the train at all until it hit him and after it hit him I jumped up and ran over there. After
152 69 getting there and finding out who it was I commenced looking around to see how far the train had gone down the track. I didn't step it off, I am using my own judgment of the distance. I had no occasion to measure how far those cars were from the north side. There

was not anything that called my particular attention to
53 the cars that were there on that morning. All the time I was there every day the cars were parked four or five feet from the sidewalk in my estimation. I always noticed them.

Mr. Wines: That is all. We rest.

The Court: Evidence closed on behalf of the Plaintiff.

Mr. Converse: We wish the record to show that we offer at this time a motion for peremptory instruction, asking the Court to direct a verdict of the jury finding the defendant not guilty. And we are not merely formal in this; we mean it seriously, because our position is that under the testimony of the plaintiff himself he is absolutely barred from any right of recovery under all of the latest decisions, without any exception, that have been handed down in these cases.

The Court: The jury may retire; you may be excused until ten o'clock tomorrow morning.

54 Mr. Converse: I beg the Court's pardon for talking as much as I did; the Court should have called me down.

(Jury retires.)

The Court: Let the record show that at the close of plaintiff's testimony defendant moves for a peremptory instruction to the jury directing it to find the defendant not guilty.

(Mr. Converse and Mr. Wines argue motion for a directed verdict.)

The Courft I think counsel on both sides of this case are quite familiar with this Court's construction of the opinion of the Supreme Court of the United States in the Goodman case; it has been up here a great many times and the Court has been required to rule under it, that it does not lay down any new rule. It requires a person approaching a railroad crossing to exercise due care for
70 his own safety before he attempts to cross. It is simply another way of discussing the former rules,
55 which were well established as to what the exercise of ordinary care requires a person to do when he goes into a known place of danger. Everybody knows that a railroad crossing, in the country or in the city, or in a densely populated portion of a city is a dangerous place, and the requirement of the rule is not met by merely

stopping, if there be a stop, before going into the place of danger. The law as now interpreted by the Supreme Court of the United States requires a person going into this place of danger to do whatever a reasonably prudent person would do under the same or like circumstances; he is required to use his faculties.

There is no question here but that prior to this accident the plaintiff in this case was a man of vigorous health, with good eyesight, and hearing very good. A person going into a place of danger is required to use his senses, and if he does not use his senses as an ordinarily prudent person would do and he gets hurt, it is simply his fault.

This case is different in many respects from the Conrad case; but it is like the Zayac case in many respects. I felt at liberty in the Zayac case to permit that case to go to the jury. In that case, in the car that was hit there was plaintiff's intersfate and his children, and some neighbor children; it was Sunday morning; they were on their way to St. Louis to see the wife and mother, who
156 was then in the hospital; they came along the highway to a street in the City of Collinsville in a fairly densely populated portion of that city; the driver came to a point probably ten or fifteen feet from the first track where he stopped, and looked, and listened,—according to the testimony of the witnesses. The train was coming from the right: the view was obstructed by trees along the right-of-way and by a line of telephone poles. From the point where the deceased looked, the telegraph poles were more like a picket fence than they were like a string of telephone poles, because he was looking at them just off of the pole line, so that they were almost as a solid body. Then there were the trees. He was driv-
71 ing a Ford, probably a Model "T", and after he started it he saw no train, and the natural instinct of self preservation had caused him to look and be careful, as well as his desire to protect the children who were with him, some of whom were his guests and the others were members of his family.

Seeing no train coming, he started to cross the tracks. The limited train which was due in St. Louis in a very short time, came along, and must have been going at an exceedingly high rate of speed, because just before the train hit the car the fireman made an exclamation to the

engineer, and the engineer as he described it "put the air brakes in the nine hole" which means the emergency,—
157 and that train spit fire and creaked for half a mile before it could stop. In other words, the rear of the train was half a mile distant from the scene of the impact.

The Court felt in that case that due to the extremely high rate of speed at which the train was going, the fact that it could cover so much ground in a few seconds,—that it was probable,—if the deceased had seen it,—he would probably have felt that he could cross the track before the train could have gotten to the crossing,—but there was no evidence tending to show that he did see it. So in that case this Court felt that while the deceased had not done everything that could have been done to ascertain the danger that was imminent, that he nevertheless did fairly well—as well as an ordinarily prudent person would have done under the same circumstances.

The jury returned a verdict; motion for a new trial was made and denied, and judgment entered upon the verdict. And when that case reached the Court of Appeals, the Court of Appeals said that it was clearly within the Goodman case; and therefore the judgment was reversed. Now, in that case there was the exceedingly high and dangerous rate of speed,—in fact, in a few seconds that train would go further than the train in question in this case would go in going from the depot to the shops. In this particular case there is some testimony tending to show that the
158 train was going at the rate of twenty-five to thirty miles an hour,—I think that is the extreme testimony, and I think that is probably true, that is was going somewhere between twenty and thirty miles an hour.
72 And that speed used to mean a great deal to us, but since we have been riding in automobiles and watch the speedometers, we know that a speed of from twenty to thirty miles an hour is going pretty slow. Of course, it takes several miles for a passenger train, particularly a passenger train with six coaches attached to it,—it takes considerable steam and a considerable distance to reach a speed of thirty miles an hour; it can not be done in a couple of blocks. A couple of blocks is not more than twice the length of the train, and those trains don't pick up speed that way.

The trouble with all of us when we are using automo-

billes is that we get careless, and then if we get hurt by reason of our own carelessness we are very apt to want to lay it upon somebody else. And this plaintiff is in that regard no different from anybody else,—or any worse than anybody else, in the same circumstances, because people are inclined to get careless. They get used to passing cars going at forty and fifty and sixty miles an hour in perfect ease and perfect safety on the highway, and entirely lose sight of the fact that a speeding train cannot do anything except start and stop, increase speed a little and slow down; that is all they can do.
159 It has to run on rails and unless it runs on the rails there is a wreck in which many human lives may be lost.

The Court will not, of course, make the direction now, but I have said what I have said in order that counsel may have a general view of the way the Court feels about this case. I will think about it until tomorrow morning.

Mr. Marshal, adjourn court until ten o'clock tomorrow morning.

Adjourned until Ten O'clock, A. M. Thursday, June 23, 1932.

160 Federal Building, Springfield, Illinois,
Thursday, June 23, 1932,
Ten O'Clock, A. M.

73 Court Convened:

Pursuant to Adjournment.

Appearances:

Same as before.

The Court: In the case at bar, it seems to me that this case comes clearly within the Goodman case.

Mr. Wines: Except there was no wilful count in the Goodman case.

The Court: Well, in the light of the evidence, the Court would have to disregard that count, because there is no evidence of wilfullness in this case.

Justice Holmes says: "We do not go into further details as to Goodman's precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from respon-

sibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not
161 the train stop for him. In such circumstances it seems to us that if a driver can not be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than stop and look. It seem to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. If at the last moment Goodman himself in an emergency it was his own fault that he did not reduce his speed earlier or come to a stop."

In this case it is very clear that if the plaintiff stopped where he said he stopped, he stopped where he could not see very far down the track. If he had simply gone upon the side track and looked he could have seen probably to the Wabash depot. But it was daylight, and he didn't see it.

The motion for a peremptory instruction will have to be allowed, and while to the Court it is unpleasant to put a man who is so grievously injured as this man is, out
74 of court, under the decision of the Supreme Court of the United States he is responsible for his own condition, and not the railroad. The motion for a peremptory instruction will have to be allowed.

Gentlemen of the Jury, you are instructed to find the defendant not guilty; the Court will enter your verdict for you: "The jury find the defendant not guilty".

162 Gentlemen of the Jury, you may stand aside.

(To which ruling of the Court, the Plaintiff, by his counsel, then and there duly excepted.)

Thereafter, on to-wit, August 1, 1932, the Court entered judgment in favor of the Defendant and against the Plaintiff for costs of suit.

(To which entry of judgment, the Plaintiff, by his counsel, then and there duly excepted.)

And Now, in furtherance of justice and that right may be done, and for as much as the matters and things hereinbefore set forth do not otherwise appear of record, the Plaintiff tenders and presents the foregoing as his Bill of Exceptions in this case to the action of the Court, and prays that

the same may be settled, allowed and signed and sealed by the Court, and made a part of the record in this cause,

And the Same Is, Accordingly Done this 27th day of August, A. D. 1932.

LOUIS FITZHENRY,
Judge.

August 27, 1932.

We hereby approve the above and foregoing bill of exceptions.

ALLEN & CONVERSE
Attorneys for Defendant.

75 And afterwards, to wit: on the 19th day of October, A. D. 1932, there was filed in the office of the clerk of the said court, a certain Petition for appeal, assignment of error and order allowing appeal, which said petition for appeal, assignment of error and order allowing appeal are in the words and figures, following, to wit: Filed Oct. 19

76 (Caption)

APPLICATION FOR APPEAL.

Now come C. S. Andrus and W. St. J. Wines, Attorneys for the plaintiff in the above entitled cause, and pray an appeal to the United States Circuit Court of Appeals, Seventh Circuit. Entered Oct. 19

Dated at Springfield, Illinois, this 19th day of October, A. D. 1932.

C. S. ANDRUS
W. ST. J. WINES,
Attorneys.

ORDER.

It Is Ordered, that the appeal prayed be allowed upon condition that plaintiff give bond in the sum of Five Hundred Dollars with good sufficient security to be approved by the Clerk of this Court, within ten days from date of this order.

Entered this 21st day of October, A. D. 1932.

LOUIS FITZHENRY
Judge.

Endorsed: Filed Oct. 19, 1932 S. T. Burnett, Clerk.

77 * * (Caption) * *

ASSIGNMENT OF ERRORS.

The Court erred in directing the verdict for the defendant.

C. S. ANDRUS,
W. ST. J. WINES,
Attorneys.

Indorsed: Filed Oct. 19, 1930, S. T. Burnett, Clerk.

78 And afterwards, to wit: on the 27th day of October, 1932. A. D. 1932, there was filed in the office of the clerk of said court, a certain Bond on Appeal, which said Bond on Appeal was and is in the words and figures, following, to wit:

79 * * (Caption) * *

APPEAL BOND.

Know All Men by These Presents, that we, John Pokora, as principal, and Theresa Pokora, as surety, of the County of Sangamon and State of Illinois, are held and firmly bound unto the Wabash Railway Company, a corporation in the penal sum of Five Hundred Dollars, for the payment of which, well and truly to be made, we and each of us bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated at Springfield, in the District and Division of the United States District Court aforesaid, this 27th day of October, A. D. 1932.

The condition of the above obligation is such, that whereas, the said Wabash Railway Company, a corporation, defendant, did on the first day of August, A. D. 1932, at a term of United States District Court holden at Springfield within said district, obtain a judgment against the above bounden, John Pokora in the above entitled cause for costs of suit, from which judgment the said John Pokora has prayed for and obtained an appeal to the United States Circuit Court of appeals in and for the seventh circuit.

Now, if the said John Pokora shall duly prosecute said appeal, and shall, moreover, pay the amount of all costs rendered and to be rendered against him, the said John Pokora,

in case the said judgment shall be affirmed in the said United States Court of appeals for the seventh circuit, then the above obligations to be null and void, otherwise to remain in full force and virtue.

80 JOHN POKORA (Seal)
THERESA POKORA (Seal)

Approved, October 27th, A. D. 1932 S. T. Burnett, Clerk.

(Caption)

THERESA POKORA, being first duly sworn doth depose and say that she is the owner of the following described real estate which is situated in the County of Sangamon and State of Illinois, the same being within the Southern Division of the Southern District of the United States District Court, towit:

A four room house and lot located at and known as 2216 East South Grand Avenue; also a four room house and lot located at and known as 2218 East South Grand Avenue, both of said parcels being situated in the County of Sangamon and State of Illinois.

The affiant further states that the said parcels are free and clear of any incumbrance or lien against the same and that the fair cash value of said parcels is not less than Three Thousand Dollars.

THERESA POKORA

Subscribed and sworn to before me this 27th day of October, A. D. 1932.

S. T. BURNETT,
(L. S.) *Clerk U. S. District Court, Southern District of Illinois.*

81 And afterwards, to wit: on the 27th day of October, A. D. 1932, there was filed in the office of the clerk of said court, a certain Praecipe for Transcript, which said Praecipe together with acknowledgment of service thereof, was and is in the words and figures, following, to wit:

82 (Caption)

PRAECIPE.

To S. T. Burnett, Clerk of the United States District Court for the Southern District of Illinois:

You are hereby instructed to prepare a record for appeal by John Pokora, plaintiff, to the United States Circuit Court of Appeals for the Seventh Circuit, containing:

A copy of the transcript from the Circuit Court of Sangamon County, Illinois, removing the above entitled cause to the United States District Court for the Southern District of Illinois.

Also a copy of all pleadings, motions and orders entered in this Court, including the judgment and appeal bond filed by the plaintiff, after removal of said cause to this court, and bill of exceptions heretofore filed herein.

C. S. Andrus,
W. St. J. Wines,
Attorneys for Plaintiff.

Received a true copy of the above praecipe, this 27th day of October, A. D. 1932.

Allen & Converse,
Attorneys for Defendant.

Filed: October 27, 1932. S. T. Burnett, Clerk.

84 United States of America
Southern District of Illinois } ss.
Southern Division

I, S. T. Burnett, Clerk of the United States District Court in and for the Southern District of Illinois, do hereby certify that the annexed and foregoing is a true and full transcript of the proceedings had of record and on file in the case entitled John Pokora vs. The Wabash Railway Company, a corp. No. 18189, made in accordance with praecipe for transcript filed therein, as fully as the same appear from the original files and records thereof, now in my office remaining.

And I further certify that the Original Bill of Exceptions (Narrative Form) has been incorporated in said transcript of record.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Springfield this 4th day of November, A. D. 1932.

S. T. BURNETT,
Clerk.

(Seal)

83 United States of America } ss.

The President of the United States, To The Wabash Railway Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of Illinois, Southern Division, wherein John Pokora, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Louis FitzHenry, Judge of the District Court of the United States, this 20th day of October, in the year of our Lord one thousand nine hundred and thirty-two.

LOUIS FITZHENRY,
U. S. District Judge for the Southern District of Illinois.

Service of the foregoing Citation and receipt of a copy thereof, is acknowledged this 31st day of October, A. D. 1932.

ALLEN & CONVERSE,
Attorneys for defendant-appellee.

Endorsed: * * (Caption) * *. Citation. Returnable November 19, 1932. S. T. Burnett, Clerk. Filed Oct 31 1932, S. T. Burnett, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 61, inclusive, contain a true copy of the Printed Record, printed under my supervision and filed on the twenty-third day of November, 1932, on which the following entitled cause was heard and determined:

John Pokora,

Appellant,

vs.

The Wabash Railway Company, a Corporation,

Appellee,

No. 4876, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of September, A. D. 1933.

(Seal)

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court Room in the City of Chicago, in said Seventh Circuit on the fourth day of October, 1932, of the October Term in the year of our Lord one thousand nine hundred and thirty-two, and of our Independence the one hundred and fifty-seventh.

4876 John Pokora *vs.* The Wabash Railway Company } Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

And afterwards, to-wit: On the eighth day of November, 1932, there was filed in the office of the Clerk of this Court, an appearance of Counsel for Appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4876. October Term, 1932.

John Pokora,
Appellant,

vs.

The Wabash Railway Company,
Appellee.

The Clerk will enter our appearance as Counsel for Appellee.

WALTER M. ALLEN,
HENRY A. CONVERSE,
Security Bldg.,
Springfield, Illinois.

Endorsed: Filed November 8, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the fifteenth day of November, 1932, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellant, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4876. October Term, 1932.

John Pokora,

Appellant,

vs.

The Wabash Railway Company;

Appellee.

The Clerk will enter our appearance as counsel for appellant.

W. ST. JOHN WINES,
CHARLES S. ANDRUS,
Springfield, Illinois.

Endorsed: Filed November 15, 1932. Frederick G. Campbell, Clerk.

And afterwards, to-wit: On the eleventh day of April, 1933, the following further proceedings were had and entered of record, to-wit:

Tuesday, April 11, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Robert C. Baltzell, District Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Hon. Robert C. Baltzell, District Judge.

John Pokora
4876 *vs.*
The Wabash Railway Company

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

It is ordered by the Court that this cause be, and the same is hereby set down for hearing on April 21, 1933.

And afterwards, to-wit: On the twenty-first day of April, 1933, the following further proceedings were had and entered of record, to-wit:

Friday, April 21, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

John Pokora
4876 *vs.*
The Wabash Railway Company

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of Counsel and on oral arguments by Mr. W. St. John Wines, counsel for appellant, and by Mr. Henry A. Converse, Counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the sixth day of July, 1933, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 4876. October Term, 1932, April Session, 1933.

JOHN POKORA, *Appellant.*

vs.

THE WABASH RAILWAY COMPANY, a Corporation, *Appellee.*

Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

July 6, 1933.

Before ALSCHULER, EVANS and SPARKS, *Circuit Judges.*

By this action appellant seeks to recover damages alleged to have been sustained by him as a result of being struck by appellee's railway train at a grade crossing in Springfield, Illinois. The first count of the declaration contained a general charge of negligence; the second count described the environment in detail and alleged special negligence on the part of appellee in that it placed certain freight cars on a switch track in close proximity to the intersection in question, and that it had operated its train toward the intersection at a high and dangerous rate of speed; the third count charged a wilful and wanton injury, again describing the environment with particularity. At the conclusion of appellant's evidence the court instructed the jury to find for appellee which it did, and judgment was thereupon entered for appellee for costs.

SPARKS, *Circuit Judge.* Viewed in the light most favorable to appellant, the evidence submitted supports the following facts: Tenth Street in the city of Springfield runs north and

south. It is intersected by Edwards Street which runs east and west, and at this point the accident happened. Appellee's railway tracks and station are located on Tenth Street, and the station is five city blocks due north of Edwards Street. At the intersection referred to appellee has four tracks. East of and parallel with the main track is one switch track and on the west of the main track there are two switches. On the north-east corner of the intersection of the streets there is located an ice plant. Its main building is flush with the west and south property lines and has a frontage of about eighty feet on Edwards Street. The west property line of the ice company is parallel with the railroad tracks and is seventeen and a half feet east of the east rail of the east switch and thirty and a half feet east of the east rail of the main track. Thirty feet east of the main building, and seven and a half feet north of its south line is located the ice company's service station which has a frontage of thirty feet on Edwards Street. Fifteen feet east of the service station is a public alley running north and south. Edwards Street is eighty feet in width between property lines. The traveled portion is thirty feet in width and is paved with brick to the extended west property line of the ice company, and with macadam from that point to the first railroad track. The north line of the pavement is twenty-five feet south of the south property line of the ice company, and thirty-two feet south of the loading platform of the ice service station. At the intersection of the paved portion of Edwards Street and the alley, which is about 175 feet east of the first railroad track, a driveway runs northwestwardly to the service station, and returns southwestwardly to the paved portion of Edwards Street at about 90 feet east of the first track.

Appellant was engaged in the grocery and retail ice business and purchased his ice from the company referred to. On the morning of August 17, 1929, he left his home at 5:45 a. m. when it was daylight, and with his automobile truck drove to the ice plant for the purpose of securing ice. He decided to go across the tracks to another plant of the same company which was located at the southwest corner of Edwards and Tenth Streets. A string of box cars was standing on the east switch track at a point from forty-two to forty-eight feet north of the center of Edwards Street. At that time the scoring machine composed of eight saws (used for sawing ice) was running and caused a loud singing noise

which could be heard for the distance of a city block. Before entering upon the tracks, appellant stopped his truck at a point from ten to fifteen feet east of the east switch. He remained in the truck and without stopping his engine looked north and south and listened for trains. Not hearing or seeing any, he drove across the switch track and upon the main track and was there struck by a south bound passenger train which had stopped at the station and was then traveling at an estimated speed of from twenty-five to thirty miles per hour without sounding the bell or whistle. Appellant's witnesses are not in accord as to the location of the rear end of the train when it stopped. They place it at different points from barely south of Edwards Street to one hundred and fifty feet below that point.

Appellant had been in the habit of getting ice from both ice houses for the past ten years and was fully acquainted with the surroundings. He usually went any time from six to seven thirty o'clock in the morning, and had crossed the tracks at that point for the purpose of getting a quicker delivery of ice very frequently. He knew that there was an early morning south bound train and had seen it pass that place on many other days. On the morning of the accident no one was in front of him at the crossing; the watchman was not there, and appellant knew that he did not come on duty until seven o'clock.

The trial court based its peremptory instruction upon the authority of *Baltimore and Ohio R. Co.* v. *Goodman*, 275 U. S. 66, and *Wabash R. Co.* v. *Zayac*, 30 Fed. (2d) 764. Appellant, however, seeks to distinguish those cases from the instant case by the fact that neither driver of those automobiles stopped his car before driving on the track, and by the further fact that in the Goodman case the accident occurred at a country grade crossing, and in the *Zayac case* it occurred three blocks inside the limits of a small city where nothing obstructed the driver's view, while in the instant case, the crossing was in a thickly settled portion of a large city where the driver was prevented from seeing the approaching train by the ice company's building and the freight cars on the switch. It may be said, however, that if appellant stopped his truck within ten to fifteen feet from the east switch, as he stated, the ice company's building could not possibly have interfered with his vision of the train.

In the *Goodman case, supra*, the Court said, at page 69:

"We do not go into further details as to Goodman's

precise situation, beyond mentioning that it was daylight and that he was familiar with the crossing, for it appears to us plain that nothing is suggested by the evidence to relieve Goodman from responsibility for his own death. When a man goes upon a railroad track he knows that he goes to a place where he will be killed if a train comes upon him before he is clear of the track. He knows that he must stop for the train, not the train stop for him. In such circumstances it seems to us that if a driver cannot be sure otherwise whether a train is dangerously near he must stop and get out of his vehicle, although obviously he will not often be required to do more than to stop and look. It seems to us that if he relies upon not hearing the train or any signal and takes no further precaution he does so at his own risk. * * * It is true as said in *Flannelly* v. *Delaware & Hudson Co.*, 225 U. S. 597, 603, that the question of due care very generally is left to the jury. But we are dealing with a standard of conduct, and when the standard is clear it should be laid down once for all by the Courts. See *Southern Pacific Co.* v. *Berkshire*, 254 U. S. 415, 417, 419."

It may be true that the crossing in that case was in a country district, although the opinion does not so state, yet we are unable to understand why the rule there laid down does not apply to a crossing in a city as well as in the country; if it were otherwise a traveler would be required to exercise more care in crossing a railroad track in the country where his vision was less obstructed than in a congested city where it is more restricted. The railroad company and the traveler are each required to exercise ordinary care at all grade crossings. Ordinary care is a relative term and varies with audible and visual environment rather than with strict geographical location. The law interprets ordinary care to be that degree of care which a person of ordinary prudence, under the particular circumstances, is presumed to exercise to avoid injury. Such care is required to be in proportion to the danger to be avoided and the fatal consequences that may result from the neglect. *Illinois Central R. Co.* v. *Cheek*, 152 Ind. 663.

If appellant stopped his truck within ten to fifteen feet from the east switch, as he stated, the ice company's building could not then have interfered with his vision of the train, and the box cars constituted the only obstruction of his vi-

sion to the station, which was five blocks away. He was then twenty-eight feet from the main track and about forty feet southeast of the box cars. He could then see the main track for a slight distance north of the south end of the first box car, and that distance rapidly increased northwardly as he traveled west, so that when he reached the west rail of the switch, which was eight feet from the main track, his vision of that track was clear.

The charge of wilfull injury is not supported by substantial evidence and we think the facts proven are well within the rule of the *Goodman case*. The fact that appellant stopped his car twenty-eight feet back of the main track is not sufficient to distinguish one case from the other, for if he could not see by reason of the box cars, and could not hear on account of the scoring machine and the noise of his own motor, it was his duty under the authority of the *Goodman case* to take further precautions.

JUDGMENT AFFIRMED.

ALSCHULER, *Circuit Judge*, dissenting. In my judgment *B. & O. R. Co.* v. *Goodman*, *supra*, is not here applicable. What was there said was with reference to a crossing in the country where the view along the track to one on the highway approaching the railroad crossing was partly obstructed by a building just off the railroad right of way. Here the crossing was in a populous and busy part of a large city.

Tenth street, which the railroad occupies, is 66 feet wide. In the center is the main track. East of the main track is a switch track, and west of the center two switch tracks. On the northeast corner of Edwards and Tenth streets there is a large ice house. A string of box cars was standing on the east switch track north of Edwards street, extending to within a very few feet of the north sidewalk on Edwards street. Two witnesses testified there were box cars on each of the two east tracks, but in view of the plat which appellant offered in evidence this is probably an error. In the briefs and arguments no contention is made that there were box cars on the two east tracks.

The building alone would not have obstructed the view to the north when one reached the east line of Tenth street. But the string of cars on the east track was not only an obstruction to full view north along the main track, but would have been a menace to safety to one stopping on the east track to look and listen for approaching trains, because

one could not know whether at the north end of the cars there was an engine which might at any time push the cars toward the south. The cars cut off the view for any substantial distance north on the main track to one approaching from the east until he came past the overhang of the standing cars; and since one driving an automobile is some distance from its front, the front of the car would be very close to, if not upon, the east rail of the main track before the driver of the car would have full view north.

Had appellant gone forward upon the switch track before stopping to look and listen, he would have encountered the new danger of possible movement of the string of box cars. He stopped just before reaching that track, and several automobiles behind him stopped also. There he looked and listened and, seeing no danger and hearing no warning, proceeded to cross. With the necessary momentum acquired to reach the place where he did have full view north on the main track, it is at least problematic whether on reaching the switch track he could have stopped the car in time to avoid the collision, even if he then saw the approaching train a few rods away.

It appears in the Goodman case that when the building which would obstruct the view from farther back had been passed, there was full view of the track, and time to stop before reaching it. Quite different in this respect is the case at bar, where after passing the building there were yet the box cars which obstructed the view and prevented stopping to look and listen at any place nearer the main track than that at which appellant did stop.

True, appellant was familiar with this crossing. He lived some distance east of the tracks, and in his business required ice daily. When, as he often did, he came early in the morning for ice, he usually got his supply from the ice house just east of the tracks. But this was an unusually busy morning. The State Fair was in progress, and the platform where most generally he got his ice was occupied by others who preceded him there for the same purpose. He was told by the man in charge that it would be twenty minutes before he could be served, and that he had better go to an ice house just west of the tracks, which he proceeded to do. He crossed these tracks more or less every day, but the early morning trip for ice did not usually involve the crossing of the tracks.

While he stated that he knew generally a passenger train passed there about that time, he says he did not pay attention to the train. He testified he supposed the train had already gone, or, if not, that it was late. Another witness, whose place of business gave him full view of the trains, said the train that morning was ten or fifteen minutes late and was running unusually fast. So even if appellant definitely knew the regular time of that train, he had no means of knowing what time it would go through if it was late, if, indeed, he was not justified in assuming it had already passed.

Pokora testified that when he crossed the tracks early in the mornings sometimes there was a flagman there and sometimes there was not. He testified definitely to stopping, looking and listening, and other witnesses abundantly corroborated him, especially those who waited behind him to make the same crossing and followed him as he proceeded across.

If, under these circumstances, and without oral or visual indication of an approaching train, the suggestion of the Goodman case were applied—that he leave his car, go forward afoot to the main track to see whether a train was approaching in either direction, and then, returning to his car, start it up and drive across the tracks—it seems to me that he would be inviting disaster more probable than was reasonably to be anticipated from doing what he did. By the time he returned to and entered his car, started it and drove it to the main track, a swiftly running train, which may not have challenged his attention when he was there before, might have come upon him.

There have been quite a number of cases wherein Circuit Courts of Appeals have distinguished the Goodman case, and have supported recoveries in railroad crossing accidents where persons attempting to cross tracks in an automobile did not go to the rarely exceptional extreme of leaving the car and going forward to see if a train was approaching. Among them are *C. & O. Ry. Co.* v. *Waid*, 25 F. (2d) 366 (C. C. A. 4); *Norfolk & W. Ry. Co.* v. *Holbrook*, 27 F. (2d) 326 (C. C. A. 6); *Canadian Pac. Ry. Co.* v. *Slayton*, 29 F. (2d) 687 (C. C. A. 2); *Leuthold et al.* v. *Penna. R. Co.*, 33 F. (2d) 758 (C. C. A. 6); *Teague* v. *St. L. S. W. Ry. Co.*, 36 F. (2d) 217 (C. C. A. 5). In the first and last of these cases certiorari was applied for and denied. 278 U. S. 629; 281 U. S. 733.

Proof of appellee's negligence was manifestly sufficient to

send that issue to the jury. To an unusual degree of certainty the evidence for appellant shows that no bell was rung or whistle sounded, and no alarm whatever given of the approaching train. I believe that under these circumstances, in this populous locality, at this busy crossing, where the duty of the railroad company must be reasonably commensurate with known perils, one driving across the track may, to a reasonable degree, rely upon his ascertainment of the absence of all statutory warning of an approaching train as some assurance that no approaching train is in hazardous proximity.

I believe that the evidence required submission to the jury of the question of appellant's contributory negligence, and that it was error to direct the verdict for appellee.

Endorsed: Filed July 6, 1933. Frederick G. Campbell, Clerk.

And on the same day, to-wit: On the sixth day of July, 1933, the following further proceedings were had and entered of record, to-wit:

Thursday, July 6, 1933.

Court met pursuant to adjournment and was opened by proclamation.

Present:

Hon. Samuel Alschuler, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Hon. William M. Sparks, Circuit Judge.
Frederick G. Campbell, Clerk.
Henry C. W. Laubenheimer, Marshal.

4876. John Pokora *vs.* The Wabash Railway Company } Appeal from the District Court of the United States for the Southern District of Illinois, Southern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Southern District of Illinois, Southern Division, and was argued by counsel.

On consideration whereof: It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed with costs.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Frederick G. Campbell, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 65 to 75, inclusive, contain a true copy of the proceedings had and papers filed (excepting the briefs of counsel, and stipulations, motions and orders relating to the filing of briefs) in the case of

John Pokora,

Appellant,

vs.

The Wabash Railway Company, a Corporation,

Appellee,

No. 4876, October Term, 1932, as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 28th day of September, A. D. 1933.

FREDERICK G. CAMPBELL,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

(Seal)

IN SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME—Filed Oct. 5, 1933

Upon consideration of the application of John Pokora and upon good cause shown, the time for applying for a review upon certiorari of the judgment of the Circuit Court of Appeals of the Seventh Circuit in the above entitled cause rendered on July 6, 1933, is hereby extended for a period of forty (40) days from this date.

Dated at Washington, D. C., October 4th, 1933.

Willis Van Devanter, Associate Justice.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 18, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.